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Supreme Court, U.S.
FILED

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No. 07-___

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

PHILLIP D. CHADSEY *
P.K. Runkles-Pearson
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 294-9376

* Counsel of Record — *Counsel for Petitioner*

June 24, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. May state courts redefine their underlying property law to avoid a regulatory takings claim under the Due Process and Just Compensation clauses of the Fifth Amendment?

2. If a state permanently prohibits a property owner from harvesting a crop of merchantable timber so as to deny it substantially all economically viable use of that property to protect wildlife habitat, can the owner maintain a claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), for a temporary taking of substantially all of that timber when the state unexpectedly lifts the prohibition?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10 percent or more of the corporation's stock.

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STATE OF OREGON,
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On Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner Boise Cascade Corporation ("Petitioner" or "Boise Cascade") respectfully petitions for a writ of certiorari to review a judgment of the Oregon Court of Appeals.

OPINIONS BELOW

The decision of the Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry* is reported in 174 P.3d 587 (Or. Ct. App. 2007) ("*Boise VI*") and is reproduced as Appendix A ("App. A"). The Oregon Supreme Court's March 26, 2008 order denying Petitioner's petition for review of *Boise VI* (SC S055621) is reproduced as Appendix B ("App. B"). The circuit court's 2004 judgment is reproduced as

Appendix E ("App. E"). The Oregon Court of Appeals' 2003 opinion is reported in 63 P.3d 598 (Or. Ct. App. 2003) ("*Boise V*") and is reproduced as Appendix F ("App. F"). The Oregon Supreme Court's order denying Petitioner's petition for review of *Boise V* (SC S50346) is reproduced as Appendix G ("App. G"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018), dated September 3, 2001, granting the State of Oregon (the "State") summary judgment on its ripeness defense is reproduced as Appendix H ("App. H"). The Oregon Court of Appeals' 1999 opinion is reported in 991 P.2d 563 (Or. Ct. App. 1999), and is reproduced as Appendix I ("App. I"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018), dated October 16, 1997, denying Petitioner summary judgment on its possessory takings claim based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982), and granting summary judgment on the issue of liability on its regulatory takings claim based on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is reproduced as Appendix J ("App. J"). The jury verdict finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues is reproduced as Appendix K ("App. K"). The circuit court's 1993 judgment is reproduced as Appendix L ("App. L"). The Final Order of the Board of Forestry, affirming the State Forester's denial of Boise Cascade's amended plan for timber harvest, is reproduced as Appendix V ("App. V").

Before the 1997 trial, there was another set of appeals after the case originally had been dismissed by the Clatsop County Circuit Court. The Oregon Court of Appeals' opinion on the prior appeal, which reversed the trial court, is reported in *Boise Cascade*

Corp. v. Board of Forestry, 886 P.2d 1033 (Or. Ct. App. 1994) ("*Boise I*"), and is reproduced as Appendix M ("App. M").[1] In that instance, at the State's request, the Oregon Supreme Court granted review and affirmed in part and reversed in part the court of appeals. The Oregon Supreme Court's opinion is reported in 935 P.2d 411 (Or. 1997) and is reproduced as Appendix N ("App. N").

STATEMENT OF JURISDICTION

The order of the Oregon Supreme Court denying Petitioner's petition for review of the decision of the Oregon Court of Appeals was issued on March 26, 2008. (App. B.) The appellate judgment was entered on May 7, 2008 and is reproduced as Appendix C ("App. C"). This petition is being timely filed within 90 days of entry of that judgment. 28 U.S.C. § 2101(c). The Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1257(a), because the Oregon regulatory scheme as enforced by the Oregon courts is repugnant to the Fifth and Fourteenth amendments to the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions at issue in this case are the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause is made applicable to the states

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[1] A parallel appeal concerning the validity of the Board of Forestry's (the "BOF") decision denying Petitioner the right to harvest the subject timber is reported in *Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1041 (Or. Ct. App. 1994), *aff'd*, 935 P.2d 422 (Or. 1997).

through the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

Petitioner was prohibited from harvesting timber on its property based on Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809. This rule is reproduced in its entirety as Appendix P ("App. P"). Also involved are Oregon Administrative Rules 629-680-0000 (2000), formerly 629-056-0010; 629-680-0010(5) (2000), formerly 629-056-0020(5); 629-680-0100(1) (2000), formerly 629-056-0100(1); and 629-680-0220 (2000), formerly 629-056-0220, which declare, define and together provide for the protection of such sites as public resources. Each of these rules is reproduced in Appendices Q through T, respectively ("App. Q," "App. R," "App. S," "App. T").

The U.S. Fish & Wildlife Service (the "USF&WS") is authorized to issue an Incidental Take Permit ("ITP") for the "taking" of a threatened species under section 9 of the Endangered Species Act (the "ESA"), 16 U.S.C. § 1539.

STATEMENT OF THE CASE

A. Procedural History

In June 1990, the USF&WS indicated it intended to list the northern spotted owl as a threatened species under the ESA. On July 23, 1990, that listing took effect. 55 Fed. Reg. 26,114 (June 26, 1990). At the same time, the USF&WS issued *Procedures Lead-*

ing to Endangered Species Act Compliance for the Northern Spotted Owl (the "Procedures"), requiring the preservation of 70 acres of timber around all northern spotted owl nest sites. A copy of the Procedures is reproduced as Appendix U ("App. U").

Based on the Procedures, the BOF adopted former Oregon Administrative Rule 629-024-0809(1) and (2) (renumbered as 629-665-0210(1) and (2) (2000) (*see* App. P)), requiring private landowners to protect a 70-acre area around a nest site or an activity center "occupied by an adult pair of spotted owls, capable of breeding." Or. Admin. R. 629-665-0210(2).

Before the time the owls were listed, Petitioner had in 1988 acquired a 65-acre parcel of timber as a part of a land trade with another forest products company. That parcel is known as the Walker Creek Unit (the "Unit"). (App. M, 886 P.2d at 1035.) In 1989, Petitioner cleared a road into the Unit in anticipation of full-scale logging of the timber the following year. However, when the owls were listed in 1990, Petitioner stopped cutting trees in the Unit because a pair of spotted owls had been found nesting there. (*Id.* at 1036.)

In February 1992, Petitioner filed in compliance with Oregon law a written plan with the Oregon State Forester (the "State Forester"), seeking permission to harvest the subject timber. (*Id.*) That plan was denied by the State Forester based on Oregon Administrative Rule 629-665-0210. The State Forester indicated that Petitioner needed to protect approximately 56 acres of timber on its land as spotted owl nesting habitat (the other 14 acres composing the protected habitat were on adjacent lands owned by the State and another private landowner). On May 5, 1992, Petitioner submitted an amended

plan that was also denied because Petitioner refused to acquiesce in designating 56 acres of its land as a public resource as an owl nesting site. (App. M, 886 P.2d at 1036.) It then appealed that denial to the BOF, which affirmed the State Forester's denial of the plan in a Final Order on January 15, 1993, a copy of which is reproduced as Appendix V. Petitioner then sought review of the agency's order by the Oregon Court of Appeals, which affirmed the BOF's Final Order on December 7, 1994. (*Id.* at 1041.) That order was then also affirmed by the Oregon Supreme Court on April 10, 1997. (App. N, 935 P.2d 411.)

B. The Case

After the BOF issued its Final Order in January 1993, Petitioner commenced an inverse condemnation action against the State in Clatsop County Circuit Court, alleging a taking of its timber under the Fifth Amendment to the U.S. Constitution and a similar provision in the Oregon Constitution. The State then filed a motion to dismiss on various grounds, including that Petitioner had failed to allege facts sufficient to state a claim under the Fifth Amendment. The circuit court granted the State's motion on all grounds, and Petitioner appealed to the Oregon Court of Appeals.

On appeal, the State argued, based on the "whole parcel rule" that this Court first stated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), that Petitioner had not stated a claim under this Court's decision in *Lucas*, 505 U.S. 1003. The State based that argument on its assertion that the regulation did not deprive Petitioner of the right to harvest *all* of the merchantable timber on the 65-acre tract, because it could have harvested four

acres of timber after the 1993 nesting season. The court of appeals held that Petitioner had stated a claim under *Lucas* because, under the Oregon Supreme Court's holding in *Hawkins v. City of La Grande*, 843 P.2d 400 (1992), timber was a separate property interest under Oregon property law. (App. M, 886 P.2d at 1037.) The court of appeals also reversed on all other grounds, holding that Petitioner had alleged valid takings claims under both the Fifth Amendment and the Oregon Constitution. (*Id.* at 1033.)

The State then sought review by the Oregon Supreme Court, which was granted. The Oregon Supreme Court affirmed that Petitioner had alleged a valid takings claim for the 56 acres of timber it had been prevented from logging. The court reversed as to a temporary takings claim, involving four acres located outside the protected nesting site, that Petitioner had been delayed in harvesting because of a temporal restriction. (App. N, 935 P.2d at 411, 420 n.14.) In so doing, the court did not overturn the court of appeals' reasoning that the timber was a separate property interest under *Hawkins*. The court remanded the case to the circuit court for trial. (App. N.)

After the 1997 remand, Petitioner filed an amended complaint that separated its Fifth Amendment claim into two counts. The first was a physical occupation theory based on *Loretto*, and the second was a regulatory takings theory based on *Lucas*. Petitioner then moved for summary judgment as to the issue of liability on both counts of its federal claim. (App. I, 991 P.2d at 563, 569.)

On October 15, 1997, the Oregon Department of Forestry informed Petitioner by letter that "[o]f the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at [another] site more than eight miles away." The letter is reproduced as Appendix W ("App. W"). (*See also* App. I, 991 P.2d at 565.) The letter went on to inform Petitioner that the State no longer considered the nest site to be protected under Oregon law, but suggested Petitioner consult with the USF&WS because that agency might still consider the site to be protected under the ESA. (App. W.) The following day, the circuit court issued a letter opinion granting Petitioner summary judgment on its *Lucas* count and denying it summary judgment on its *Loretto* count. (App. J.) (*See* App. I, 991 P.2d at 565.)

Petitioner then filed a Supplemental Complaint alleging a temporary taking for the almost five years that it had been denied the right to harvest the 56 acres of timber because of the Oregon regulation. At the conclusion of the trial, the circuit court submitted the issue of liability as to Petitioner's *Loretto* count to the jury. A unanimous jury found that "plaintiff Boise Cascade Corporation [was] required to submit to a physical occupation of its property as a result of the Board of Forestry's order." (App. K.) It also made findings as to the fair market value ("FMV") of the timber both at the time the Final Order was entered denying Petitioner the right to harvest the timber and the date the State declared the site to have been abandoned by the owls. (*Id.*) As a result of those findings, a judgment was entered in the amount of $1,820,059, including interest from the date of the taking (the court of appeals' opinion incorrectly states that the judgment was for $2,279,223).

(App. I, 991 P.2d at 565.) A copy of that judgment is reproduced as Appendix X.

The State appealed. The Oregon Court of Appeals reversed the judgment, holding that Petitioner could not state a claim for the occupation of its land, for a physical taking based on *Loretto*, because "[t]he state has no control over where spotted owls choose to nest." (*Id.* at 570.) It also reversed the summary judgment on the count based on *Lucas*. The court held that Petitioner's regulatory takings claim might not be ripe for adjudication because there was the possibility that if Petitioner had applied to the USF&WS for an ITP and one had been granted, the BOF could have exercised its discretion under Oregon Administrative Rule 629-665-0210(5) (2000) to approve Petitioner's logging plan. However, the court again held that Petitioner stated a claim based on *Lucas* for a temporary taking of the 56 acres of timber it was prevented from harvesting from January 1993 to October 1997, and that the damage issue decided by the jury was properly before it, because the measure of damages would be the same under both a claim based on *Loretto* and a claim based on *Lucas*. (App. I, 991 P.2d at 570.) The Oregon Supreme Court then denied review, 18 P.3d 1099 (2000), and this Court denied certiorari, 532 U.S. 923 (2001).

After the case had again been remanded to the trial court, this Court decided *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Based on this Court's holding that a regulatory takings case is ripe when "the permissible uses of the property are known to a reasonable degree of certainty" and that the landowner was not required to submit "further and futile applications with other agencies," Petitioner moved for summary judgment on the State's ripeness de-

fense. Petitioner argued that the court of appeals had been wrong in holding that to satisfy ripeness Petitioner needed to show that it would have been futile to seek an ITP from the USF&WS before this action was commenced in 1993.

The court rejected Petitioner's argument and granted the State summary judgment on the issue of ripeness on the basis that Petitioner was estopped or precluded from demonstrating futility because it did not litigate that issue in the administrative proceeding before the BOF. (App. F, 63 P.3d at 602.) On appeal, the court of appeals reversed the trial court's summary judgment in favor of the State on the ground that it had not properly raised the defense of estoppel or issue preclusion that would bar Petitioner from showing it would have been futile to try to obtain an ITP from the USF&WS. It also held that the evidence Petitioner had submitted in support of its cross-motion for summary judgment was insufficient to show futility. The court of appeals then remanded the case again to the trial court to allow the parties to present further evidence on the futility issue.

The Oregon Supreme Court then denied Petitioner's Petition for Review of the court of appeals' decision. (App. G.) Petitioner sought a writ of certiorari from this Court, which was denied. 540 U.S. 1075 (2003).

Following remand, a second jury trial was held in May 2004. The jury again found in favor of Petitioner. As part of a special verdict, the jury answered both of the following questions in the affirmative:

> Question 1: Was the plaintiff Boise Cascade Corporation deprived of all economically viable

use of its property within the regulated area as a result of the Board of Forestry's order?

Question 2: Would it have been futile for Boise Cascade Corporation to seek an incidental take permit from the US Fish & Wildlife Service prior to February 1, 1993?

(App. D.)

Just before the second trial, the State moved (over Petitioner's objection) to have the new jury reconsider all issues of fact including the FMV of the timber in January 1993, when the plan to harvest the timber was denied, and in October 1997, when the State lifted its restriction. The trial court granted that motion, and in the second trial the jury found that the FMV of the timber had declined by $25 during that period. The trial court, again over the objection of Petitioner, entered a judgment in that amount. (App. C.)

Petitioner filed a timely appeal asking that the 1997 judgment be reinstated because the State had not challenged any issue related to damages after the first jury verdict and because, in deciding that appeal, the court of appeals had held that the jury's damage award had been proper. (App. A, 174 P.3d 587.) The State cross-appealed. The court reversed the judgment in favor of Petitioner, now holding that the "whole parcel rule" applied, based on the 2005 decision of the Oregon Supreme Court in *Coast Range Conifers v. Board of Forestry*, 117 P.3d 990 (Or. 2005), that decided that merchantable timber was no longer a separate property interest under Oregon law that could be the subject of a regulatory taking and that reversed its 1997 decision in this case to the contrary. The Oregon Supreme Court denied Peti-

tioner's petition for review on March 26, 2008. (App. B.)

REASONS FOR GRANTING THE PETITION

Under Supreme Court Rule 10(c), a ground for review exists when a state court has decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. Those grounds for review are present in this case. In this case, the decision was rendered by a lower appellate court and the state court of last resort refused to grant review. (Apps. A, B.)

I. The Petition Should Be Granted Because the Decision Below Conflicts with This Court's Pronouncement That a State May Not Strip a Plaintiff of a Regulatory Takings Claim by Changing Underlying State Property Law

In *Boise I* (App. M), the Oregon Court of Appeals held that Petitioner had stated a claim for relief under *Lucas* because, under the Oregon Supreme Court's holding in *Hawkins*, timber was a separate property interest under Oregon property law and the timber itself determined what constituted a near-total taking under *Lucas*. (App. M, 886 P.2d at 1037.) That holding was untouched by the Oregon Supreme Court's later rulings in this case. In 2005 the Oregon Supreme Court in *Coast Range Conifers*, 117 P.3d 990, without mentioning *Hawkins*, reversed course and held that timber was not a separate interest in property for purposes of evaluating a takings claim unless the timber was subject to a

contract to be cut. In its most recent decision in this matter, *Boise VI*, 174 P.3d 587 (App. A), the court of appeals also reversed direction, ignoring the law of this case and following *Coast Range Conifers* to hold that Petitioner's timber was *not* a separate property interest. That change cannot, and does not, provide an end-run around the U.S. Constitution's protections against governmental takings.

Under the U.S. Constitution, state courts are not free to redefine their property laws to avoid a regulatory taking of property for a public use. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."); *see also Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring: "[A] State [court] cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property [right] it has taken never existed at all."), *cited with approval in Lucas*, 505 U.S. at 1030. To do so would itself constitute a taking based on judicial fiat. Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990); *see also Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334 (1994) (Scalia and O'Connor, JJ., dissenting from denial to grant certiorari, stated that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation"). Even more recently, this Court has had to remind the Oregon courts in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), that "the Takings Clause of the Fifth Amendment[] [is] as much a part of the Bill of Rights as the First Amendment or Fourth Amendment." The Oregon appellate courts never have affirmed a

jury verdict awarding compensation to a property owner in a regulatory taking case.

This Court should accept review to address the Oregon courts' overreaching in redefining state property law to avoid a takings claim.

II. The Petition Should Be Granted Because the Decision Below Conflicts with the Court's Pronouncement That a Plaintiff May State a Regulatory Takings Claim by Showing That All but a Minimal Amount of the Parcel's Economic Value Has Been Taken

The Oregon Court of Appeals held that Petitioner could not state a takings claim under *Lucas* because Petitioner was barred under that theory from recovering for any taking of less than 100 percent of Petitioner's whole parcel. That holding misapplied this Court's regulatory takings precedents, and this Court should accept review to clarify the law. This Court has established that takings of less than 100 percent of the value of a whole parcel may be compensable under the Takings Clause. *Lucas* itself recognized that takings that are "one step short of complete," 505 U.S. at 1019 n.8, and in particular takings of 95 percent of the economic value of property, may be compensable under the Fifth Amendment. In *Palazzolo*, 533 U.S. at 630-32, this Court held that the plaintiff could proceed with a regulatory takings claim, even though he was only prohibited from developing a portion of his property. In *Palazzolo*, the Court stated:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking *nonetheless may have*

> *occurred*, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

Id. at 617 (emphasis added).

The flexibility of the whole parcel rule is obviously designed to uphold the spirit of the Fifth Amendment and avoid arbitrary formulas that may not carry out its intent. Thus this flexibility prevents government from playing games with its Fifth Amendment obligations (as the State has done here) by taking 97 out of every 100 trees on private property for its own use, and then refusing *any compensation* to the landowner on the theory that, because it left three trees, it has not effected a constitutional taking.[2]

In this case, the evidence showed that the State took all but a negligible interest in Petitioner's property. During the 2004 trial, the State argued that Petitioner had not been deprived of all economic use of its property. The argument came in two forms:

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[2] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), is not to the contrary. That holding was of narrow scope and limited to planning moratoria on residential construction. *Id.* at 307. Moreover, it does not apply to a situation such as this, in which there was a permanent ban on the use of commercial income property that was subsequently rescinded. *Seiber v. United States*, 364 F.3d 1356, 1364 (Fed. Cir. 2004); *Lucas*, 505 U.S. at 1030 n.17. The ban on logging at issue here was permanent on its face and made it impractical to make any economic plans for logging the timber at the time of imposition. Unlike *Tahoe-Sierra*, the ban here did not involve a planning moratorium, which, as the court in that case noted, Oregon law limits to a period of 10 months. 535 U.S. at 342 n.37.

First, the State attempted to invoke the whole parcel rule and argue that it had taken only 56 acres of a 65-acre parcel. Then the State argued that even as to the 56 acres, Petitioner was deprived only of the timber—the State had not taken potential mineral rights, potential value that real estate speculators might give the land, or other rights (*e.g.*, the 56 acres could be used as a nature conservatory or for marketing purposes). With respect to this latter argument, the jury considered and rejected *each and every one* of the State's arguments that the 56 acres might have value apart from the timber, and unambiguously found that Petitioner's 56 acres had been deprived of all economically valuable uses. In its motion for directed verdict and on appeal, the State wholly failed to cite *any* factual record that the 56 acres had economic value apart from the timber that Petitioner was prohibited from harvesting.

Even if, as the State has contended, limiting the jury's consideration to the 56 acres was improper under the whole parcel rule, Petitioner established a taking as to the entire 65-acre parcel. Here, the State admitted that the timber on the unregulated nine acres of the 65-acre parcel had a FMV of approximately $55,750. (*See* Respondent's Brief (CA A79626) at 23.) Thus, even if the entire 65 acres is the "whole parcel" by which the State's taking must be measured, the regulation deprived Petitioner of 96.7 percent of the FMV of the entire 65-acre parcel.[3] Moreover, the State prohibited logging 56 of the 65

[3] The 2004 jury determined the timber taken by the State in the 56-acre parcel had a FMV of $1,654,025. If the 1997 jury's $2,279,233 FMV is preclusive (as it should be), then the BOF's regulation deprived Petitioner of 97.6 percent of the economic value of the 65-acre parcel.

acres, meaning that Petitioner was precluded from logging 86 percent of a 65-acre tract. Consequently, even if this Court assumes that what matters is the value of the "whole parcel," *i.e.*, 65 acres, it cannot say as a matter of law that Petitioner's property had any significant surviving economic use.

In short, the facts as decided by the jury's verdict indicate that the State's regulation left only negligible economic value remaining in the subject property. The Oregon Court of Appeals ignored that fact when it rejected a flexible reading of *Lucas* in favor of a crabbed "100 percent" rule that fails to uphold the spirit of the law. This Court should accept review to clarify the meaning of *Lucas*.

CONCLUSION

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Oregon Court of Appeals.

Respectfully submitted,

PHILLIP D. CHADSEY *
P.K. Runkles-Pearson
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 294-9376

* Counsel of Record

Counsel for Petitioner

June 24, 2008

APPENDIX

APPENDIX A

COURT OF APPEALS OF OREGON

93-2018; A126743

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff-Appellant Cross-Respondent,
v.
STATE OF OREGON, by and through
BOARD OF FORESTRY,
Defendant-Respondent Cross-Appellant.

Argued and Submitted Jan. 4, 2007
Decided Dec. 5, 2007

Philip D. Chadsey argued the cause for appellant-cross-respondent. With him on the opening brief were Charles F. Adams and Stoel Rives LLP. With them on the reply brief was Michael B. Hallinan, Portland.

Denise G. Fjordbeck, Senior Assistant Attorney General, argued the cause for respondent-cross appellant. With her on the brief were Hardy Myers, Attorney General, Mary H. Williams, Solicitor General, and Brendan C. Dunn, Assistant Attorney General.

Before EDMONDS, *Presiding Judge*, and BREWER, *Chief Judge*,[1] and CARSON, *Senior Judge*.

BREWER, *C.J.*

[1] Brewer, C. J., *vice* Wollheim, J.

This inverse condemnation case comes to us with a substantial procedural history, an account of which is set out below. Following trial after the latest remand, a jury determined that the state had taken Boise Cascade Corporation's property in violation of the Fifth Amendment by temporarily prohibiting logging and that Boise should be compensated in the amount of $25. Boise appeals and the Oregon Board of Forestry (the state) cross-appeals. Because we agree with the state's arguments on cross-appeal, we reverse.

I. BACKGROUND

The historical and procedural facts relevant to our decision, which we take from the record and from the numerous opinions in earlier iterations of this case, are undisputed. Boise owns an approximately 65-acre parcel of timberland in Clatsop County known as the "Walker Creek Unit." Old growth timber of the kind found on the Walker Creek Unit is considered to be the best suitable habitat for northern spotted owls. In 1990, a pair of spotted owls was found nesting in a tree within the Walker Creek Unit. Also in 1990, the state adopted an administrative rule that required protection of a 70-acre core area of suitable habitat encompassing such nest sites.

In February 1992, Boise filed a proposal with the Department of Forestry to log the Walker Creek Unit; it filed an amended plan in May 1992. The state ultimately denied Boise's plan to harvest timber from a 56-acre portion of the Walker Creek Unit, but advised Boise that it could log-albeit with a temporal restriction-approximately eight acres of the unit. Boise initiated this action for inverse condemnation in early 1993, alleging that, by failing to approve its proposed plan, the state had "taken" the timber on

the regulated 56 acres in violation of Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. The trial court dismissed Boise's claims on the ground that it lacked subject matter jurisdiction and that Boise's complaint failed to state a claim. Boise petitioned for judicial review of the order disapproveing the timber harvest and appealed the trial court's dismissal of its inverse condemnation claim.

In the administrative review case, we rejected Boise's arguments concerning the validity of the administrative rule upon which the board based its decision and affirmed the order. *Boise Cascade Corp. v. Board of Forestry (A78968)*, 131 Or.App. 552, 886 P.2d 1041 (1994), *aff'd*, 325 Or. 203, 935 P.2d 422 (1997) (*Boise I*). In the inverse condemnation case, we held that the trial court had erred in concluding that it lacked jurisdiction, and further held that Boise's then-operative complaint did state a claim under both Article I, section 18, and the Fifth Amendment. *Boise Cascade Corp. v. Board of Forestry (A79626)*, 131 Or.App. 538, 886 P.2d 1033 (1994) (*Boise II*). On review of that decision, the Oregon Supreme Court agreed with this court that the trial court had jurisdiction and that Boise had stated a claim for a regulatory taking. *Boise Cascade Corp. v. Board of Forestry (S42159)*, 325 Or. 185, 935 P.2d 411 (1997) (*Boise III*).

On remand, Boise dismissed its claim under Article I, section 18, of the Oregon Constitution, choosing to pursue only its federal claim; that choice had important consequences, as will be seen below. The trial court granted Boise partial summary judgment, ruling as a matter of law that a regulatory taking under the Fifth Amendment had occurred. Around

that time, one of the nesting owls died, the other left the Walker Creek Unit, and the board therefore lifted its restriction on Boise's logging of the site. Boise accordingly transformed its claim into a claim for a "temporary" taking. The issue of damages was tried to a jury, as was the question of whether a taking by "physical occupation" had occurred.[2] After a jury verdict in Boise's favor, awarding nearly $2 million in compensation, the state appealed.

In that appeal, the state argued that the trial court erred in failing to dismiss Boise's claim, in granting partial summary judgment, in striking the state's ripeness defense, and in numerous other respects. *Boise Cascade Corp. v. Board of Forestry*, 164 Or.App. 114, 116-18, 991 P.2d 563 (1999), *rev. den.*, 331 Or. 244, 18 P.3d 1099 (2000), *cert. den.*, 532 U.S. 923, 121 S.Ct. 1363, 149 L.Ed.2d 291 (2001) (*Boise IV*). In *Boise IV*, we agreed with the state on two of its arguments. First, we agreed that the trial court had erred in submitting to the jury Boise's taking by "physical occupation" theory.[3] 164 Or.App. at 126, 991 P.2d 563. Second, we agreed that the trial court had erred in striking the state's defense that Boise's claim was not ripe because it had neither attempted to obtain an "incidental take permit" (ITP) from the federal government nor shown that attempting to obtain such a permit would have been futile. *Id.* at

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[2] Boise added the "physical occupation" claim after remand.

[3] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (describing taking by physical occupation).

128-32, 991 P.2d 563.[4] We also rejected Boise's argument that its trial exhibits demonstrated that it would have been futile to try to obtain an ITP. *Id.* at 133, 991 P.2d 563. We thus reversed the judgment in favor of Boise and remanded the case. *Id.*

On remand, both parties sought summary judgment on the question of ripeness and futility. Most of Boise's arguments in support of summary judgment were to the effect that this court's decision concerning ripeness and futility in *Boise IV* was wrong. The trial court rejected those arguments. Boise also argued in its motion for summary judgment, however, that it was entitled to judgment as a matter of law on the question of futility. The state, in its motion for summary judgment, asserted that it was too late, as a matter of law, for Boise to be able to demonstrate futility. The trial court granted the state's motion and denied Boise's motion. Once more, Boise appealed.

In that appeal, we addressed whether the trial court had correctly granted the state's summary judgment motion on the issue of ripeness. *Boise Cascade Corp. v. Board of Forestry*, 186 Or.App. 291, 63 P.3d 598,*rev. den.*, 335 Or. 578, 74 P.3d 112,*cert. den.*, 540 U.S. 1075, 124 S.Ct. 940, 157 L.Ed.2d 746 (2003) (*Boise V*). The state conceded that it was not entitled to summary judgment on the theory of ripeness on which the trial court had relied. It argued, however, that Boise's claim was not ripe because "Boise, having dropped its claim under Article I,

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[4] The administrative rule under which the state had denied Boise's harvesting plan allowed an exception to the requirement for protecting northern spotted owl nesting sites if the landowner had obtained an ITP pursuant to the federal Endangered Species Act.

section 18, of the Oregon Constitution, cannot, as a matter of law, establish a violation of the Fifth Amendment to the United States Constitution. *See generally Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982) (a federal takings claim does not ripen until the claim under Article I, section 18[,] has been decided)."

Boise V, 186 Or.App. at 296-97, 63 P.3d 598. We refused to address that argument, however, on the ground that it had not been preserved in the trial court. *Id.* at 297, 63 P.3d 598. We ultimately concluded in *Boise V* that Boise was not entitled to summary judgment on the state's ripeness defense and that, as discussed above, the state also was not entitled to summary judgment. *Id.* at 304, 63 P.3d 598. After generating five appellate opinions, the case was remanded for a third time.

Before the case went to trial on the most recent remand, the state moved for "a plenary re-trial of all jury questions, including liability and damages issues." The trial court granted the motion. Boise then filed alternative motions asking the trial court to reinstate its Article I, section 18, claim or to allow it to file an amended complaint (actually, what it called a "third supplemental amended complaint") including that claim. The trial court denied both motions, and the case went to trial.

After Boise rested, the state moved for a directed verdict; it also sought a directed verdict after it rested its own case. The trial court denied both motions. Ultimately, the jury, by special verdict, found that "it would have been futile for Boise Cascade Corporation to seek an incidental take permit from the U.S. Fish & Wildlife Service prior to February 1, 1993." That is, the jury rejected the

state's ripeness defense by finding that it would have been futile for Boise to seek an ITP. The jury awarded $25 as compensation for the temporary taking of Boise's property. The state moved for a judgment notwithstanding the verdict, while Boise moved to reinstate the earlier nearly $2 million verdict from 1997. The trial court denied both motions, and this appeal and cross-appeal followed.

On appeal, Boise makes three arguments presented as four assignments of error. It argues first that the trial court should not have allowed a plenary retrial of all issues after our most recent remand. More specifically, Boise asserts that the trial court erred in granting the state's motion for a plenary retrial and in denying Boise's post-trial motion to reinstate the 1997 jury verdict. Next, Boise argues that the trial court erred in not awarding simple interest at the rate of nine percent from 1993 on the fair market value of the timber that it claims was taken. Finally, Boise assigns error to the trial court's denial of its motion to reinstate its regulatory taking claim under Article I, section 18, of the Oregon Constitution before the most recent retrial.

The state, in turn, asserts four assignments of error on cross-appeal. In related assignments, the state argues that the trial court erred in denying its motions for directed verdicts on Boise's temporary taking claim and on Boise's Fifth Amendment regulatory takings claim. The state also asserts that the trial court erred in denying its motion for a directed verdict on the ground that Boise had failed to exhaust remedies provided by state law before bringing a claim under the Fifth Amendment. Finally, the state assigns error to the trial court's denial of its motion for a directed verdict on the

ground that it would not have been futile for Boise to pursue its administrative remedies before seeking a judicial remedy.

II. DISCUSSION

A. *Federal Regulatory Takings Principles*

We begin with an overview of the legal landscape in which federal takings claims are adjudicated. The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *see Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), provides that private property shall not "be taken for public use, without just compensation." Early in the last century, the United States Supreme Court recognized that-in addition to an actual conversion of private property for governmental use-governmental regulation of private property could constitute a Fifth Amendment taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Thereafter, in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Court explained that, in engaging in the "essentially ad hoc, factual inquires" regarding whether governmental regulation constitutes a taking, courts should consider (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Id.* at 124-25, 98 S.Ct. 2646.

The Court has, however, recognized two categories of regulation that do not require the individualized, factual inquiry set out in *Penn Central*: regulation that "compel[s] the property owner to suffer a

physical 'invasion' of his property" (which is not at issue in this appeal) and "regulation [that] denies all economically beneficial or productive use of land." *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).[5] As the Court more recently explained, "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry." *Tahoe-Sierra P. Council v. TRPA*, 535 U.S. 302, 333, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

B. *The "Whole Parcel" Rule*

In *Penn Central,* the Court set out what has come to be known as the "whole parcel rule":

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. * * * [T]his Court focuses rather on both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole * * *."

438 U.S. at 130-31, 98 S.Ct. 2646. Although the *Lucas* Court appeared in *dicta* to question that rule, *see*505 U.S. at 1016-17 n. 7, 112 S.Ct. 2886, the Court also appeared to reaffirm the rule. *See* 505 U.S. at

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[5] The *Lucas* Court cited *Loretto* for the first proposition, and *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), for the second. As noted, Boise purported to assert a *Loretto* claim in its complaint, but we previously determined that Boise had not stated a claim under *Loretto.* That issue is not before us now.

1019, 112 S.Ct. 2886 ("We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." (Emphasis in original.)).

In any event, as the Oregon Supreme Court has observed, the United States Supreme Court has, since *Lucas*, "reaffirmed the [whole parcel] rule twice." *Coast Range Conifers v. Board of Forestry*, 339 Or. 136, 153, 117 P.3d 990 (2005) (citing *Tahoe-Sierra*, 535 U.S. at 331, 122 S.Ct. 1465, and *Concrete Pipe v. Pension Trust*, 508 U.S. 602, 644-45, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993)).

In fact, in *Tahoe-Sierra*, the Court emphasized the vitality of the whole parcel rule in regulatory takings cases, explaining that it applies both to physical and temporal aspects of the landowner's property rights. That case involved a claim that a temporary taking of the petitioners' property-in the form of a temporary development moratorium-was subject to the *per se* rule of *Lucas*. The Court reiterated that the "categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation *permanently* deprives property of *all* value[.]" 535 U.S. at 333, 122 S.Ct. 1465 (emphasis added). In so stating, the Court rejected the petitioners' argument that a *per se*-that is, a *Lucas*-type-taking could be established by a regulation that imposed only a temporary restriction on a landowner's right to use its property. *See id.* at 321, 122 S.Ct. 1465 ("[W]e conclude that the circumstances in this case are best analyzed within the *Penn Central* framework."). "[A] permanent deprivation of the owner's use of the entire area is a

taking of 'the parcel as a whole,'" the Court explained, "whereas a temporary restriction that merely causes a diminution in value is not." *Id.* at 332, 122 S.Ct. 1465.

The *Tahoe-Sierra* Court also reiterated the other, nontemporal aspects of the whole parcel rule. The Court repeated, for example, that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." 535 U.S. at 327, 122 S.Ct. 1465 (quoting *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979)). Thus, after *Tahoe-Sierra*, it is clear that, under the "whole parcel" rule, a *per se* *Lucas*-type regulatory taking cannot be premised on a governmental restriction that affects (1) only one portion of the owner's property, (2) only one type of interest within the property owner's "bundle" of interests, or (3) only one "temporal slice" of the property owner's fee interest.

C. *Boise Neither Pleaded Nor Proved a* Per Se *Regulatory Taking*

In its first claim for relief in its complaint, Boise asserted that the state's actions entitled it to just compensation under Article I, section 18, of the Oregon Constitution. As noted above, Boise voluntarily dismissed that claim long before the latest trial in this case. Boise's second claim, denominated a "*Loretto* Per Se Claim" in the complaint, sought compensation on the theory that the state had physically occupied its property. In *Boise IV*, as noted above, we held that Boise had "not stated a claim for a 'physical occupation' taking under *Loretto*." 164 Or.App. at 126, 991 P.2d 563. What remains, then, is what Boise's "second supplemental complaint" itself explicitly labels a "*Lucas* Per Se Claim."

On appeal, the state asserts, as it did in the trial court, that Boise neither pleaded nor proved a *per se* regulatory taking claim under *Lucas*. After Boise rested its case on retrial, the state moved for a directed verdict, arguing that "the *Lucas* claim has to be about all economically viable use of the whole parcel of land. * * *

"* * * [The state] hasn't taken all economically viable uses of the whole parcel, which is what *Lucas* requires."

The state renewed its motion after it rested its own case:

> "A *Lucas* claim has to be about the all economically viable use of the land, and in this case what we are talking about is logging, and if there is any question about that, we just need to look at * * * the Second Supplemental Complaint, paragraph 16, in which the allegation is, and it's one allegation in the *Lucas* claim, the Board's action in denying [Boise] the right to log its land deprived [Boise] of all economically productive use of its merchantable timber-not the land, the merchantable timber-and constituted a taking of [Boise's] property for a public purpose which requires the [the state] to pay [Boise] just compensation for property under the takings clause of the Fifth and Fourteenth Amendments.

"So it's not about land, it's about one strand in that bundle of rights. You can't send-the State's position is you cannot send that kind of claim to the jury, Your Honor, on the evidence before it."

The state made a similar argument regarding the viability of Boise's temporary taking claim. In its initial motion for a directed verdict, the state argued

that "the case should be dismissed because since *Tahoe-Sierra* was decided, you cannot have a *Lucas per se* claim, a categorical taking, that is temporary. And that's-we have-that's the proof that we have here is that [this is a] temporary taking under a *Lucas* claim." The trial court denied both motions, twice rejecting both arguments.

On appeal, citing *Lucas* and *Tahoe-Sierra*, the state asserts that the trial court erred in denying its motions for directed verdicts. The state observes that "a *Lucas* claim cannot be based on a portion of the property (56 of 65 or 1770 acres),[6] or on a single property interest (timber rather than the real property), or on a sliver of time (here, 45 months)." For the reasons discussed below, we agree that-for three independent reasons-Boise neither pleaded nor proved a takings claim under the Fifth Amendment Takings Clause.

"Upon review of a denial of a motion for a directed verdict, we will not set aside a jury verdict 'unless we can affirmatively say that there is no evidence from which the jury could have found the facts necessary to establish the elements of [the] plaintiff's cause of action.'"

Conway v. Pacific University, 324 Or. 231, 235, 924 P.2d 818 (1996) (quoting *Brown v. J.C. Penney Co.*, 297 Or. 695, 705, 688 P.2d 811 (1984)) (brackets in *Conway*). In this case, because the problems with Boise's case stem from its pleadings and the legal theory on which it relied, its proof suffered accord-

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[6] The reference to 1,770 acres is to the larger parcel of real property that the Walker Creek Unit initially was a part of. We assume without deciding that the relevant denominator here is 56 acres.

ingly. That is, because the claim that Boise sought to prove was deficient, there is no evidence from which a jury could have found the facts necessary to establish the elements of a properly pleaded claim.

We begin with the portional aspect of the whole parcel rule. In *Coast Range Conifers*, the Oregon Supreme Court summarily rejected the plaintiff's *Lucas* claim based on only a portion of the parcel: "Under the whole parcel rule, plaintiff's *Lucas* claim fails. Plaintiff's ability to log 31 acres of the 40-acre parcel establishes that the regulation does not deprive plaintiff's property of all its economic value." 339 Or. at 153, 117 P.3d 990. More recently, in *Seiber v. Oregon Board of Forestry*, 210 Or.App. 215, 149 P.3d 1243 (2006), *rev. den.*, 342 Or. 633, 157 P.3d 788 (2007), we addressed a temporary restriction on logging 40 acres out of a 200-acre parcel. Citing *Lucas* and *Coast Range Conifers*, we stated, "The count based on *Lucas* also fails because, under that case, no taking occurs unless the application of the state regulation renders claimant's *entire parcel* devoid of all economic value." *Id.* at 220, 149 P.3d 1243 (emphasis added). In short, because Boise did not plead or prove that the state's regulation denied it use of the entire Walker Creek Unit, the trial court should have granted the state's motion for a directed verdict on that ground.

We also agree with the state that Boise's allegations regarding only one of its interests in the Walker Creek Unit were insufficient to state a claim. As noted above, Boise pleaded and sought to prove only that the regulation "deprived [it] of all economically productive use of its merchantable timber * * *." That is, Boise sought compensation only for deprivation of one "stick" in the bundle of rights it

held in the Walker Creek Unit. But, as the Oregon Supreme Court recently explained, "Under Oregon law, * * * timber is part of the underlying real property unless it is subject to a contract to be cut." *Coast Range Conifers*, 339 Or. at 150-51, 117 P.3d 990. Boise introduced no evidence that the timber for which it sought compensation was subject to a contract to be cut. It follows that the timber was not a property interest separate from the rest of the relevant parcel that could support an independent claim for a *per se* regulatory taking. *See Seiber v. U.S.*, 364 F.3d 1356, 1369 (Fed.Cir.), *cert. den.*, 543 U.S. 873, 125 S.Ct. 113, 160 L.Ed.2d 122 (2004) ("No authority has been brought to our attention that holds as a matter of federal takings law that trees are a separate property interest before they are severed from their underlying land."). Under *Tahoe-Sierra*, a regulation that affects only one "strand" of the owner's interest in the property cannot constitute a *per se* regulatory taking.

Finally, we agree with the state on the third aspect of its argument: because Boise neither pleaded nor proved that it had been *permanently* deprived of all economic value in the Walker Creek Unit, it did not state a claim for a *per se* taking under *Lucas*. *See Boise V*, 186 Or.App. at 294 n. 1, 63 P.3d 598 (describing holding in *Tahoe-Sierra*: "a temporary restriction that merely causes a diminution in value of property is not a taking of the parcel as a whole; property is not rendered valueless by a temporary prohibition on economic use because the property will recover value as soon as the prohibition is lifted"). Indeed, the Federal Circuit, in considering a federal takings claim involving the Walker Creek Unit, although expressing some doubt about whether *Tahoe-Sierra's* holding went beyond temporary development

moratoria, explained that whether a permanent restriction that later is revoked constitutes a temporary taking is a question that must be analyzed under *Penn Central. Boise Cascade Corp. v. U.S.*, 296 F.3d 1339, 1347 (Fed.Cir.2002), *cert. den.*, 538 U.S. 906, 123 S.Ct. 1484, 155 L.Ed.2d 226 (2003). In short, the state was entitled to a directed verdict for a third reason: Boise pleaded only a temporary *per se* regulatory taking.

D. *None of Boise's Remonstrations Has Merit*

Boise makes several arguments in response. It begins with the assertion that the Oregon Supreme Court "announced a major change in Oregon property law" when it stated in *Coast Range Conifers* that standing timber is part of the underlying real property and not a severable interest for purposes of the whole parcel rule. It claims that the Supreme Court ignored its own holding in *Hawkins v. City of La Grande*, 315 Or. 57, 70-71, 843 P.2d 400 (1992), that growing crops are a separate property interest from the real property on which they grow. Boise asserts that "state courts are not free to redefine their property laws in order to avoid a regulatory taking" under the Fifth Amendment, so that this court cannot rely on the Supreme Court's pronouncement in *Coast Range Conifers* regarding the nonseverability of Boise's timber.

Boise's argument, regardless of its merit, is directed to the wrong court. The Supreme Court's pronouncement in *Coast Range Conifers* is binding on this court. Under that holding, an allegation that a state regulation has deprived a property owner of only one interest out of several-the interest in its timber, in this case—does not state a claim for a *per*

se regulatory taking under the Fifth Amendment Takings Clause.

Boise next makes an argument based on the law of the case doctrine. In *State v. Montez*, 324 Or. 343, 347, 927 P.2d 64 (1996), *cert. den.*, 520 U.S. 1233, 117 S.Ct. 1830, 137 L.Ed.2d 1036 (1997), the court explained:

> "It is a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review."

(Internal quotation marks omitted.) Boise asserts that, in *Boise III*, the Supreme Court "squarely rejected" the state's whole parcel argument and "held that Boise had stated a claim for the taking of 'approximately 56 acres of merchantable timber.'" It claims that, "even though [*Coast Range Conifers*] subsequently effected a dramatic change in Oregon property law-by holding that a taking of merchantable timber must be measured with respect to the 'whole parcel' and not as a separate property interest-the law of the case doctrine precludes that subsequent ruling from applying to this case."

Bluntly, Boise asserts that we must ignore Supreme Court precedent that is directly on point—*Coast Range Conifers*—under the law of the case doctrine.

We need not address that precise question, however, because the premise underlying Boise's law of

the case argument-that the court in *Boise III* addressed the very same legal issue before us now-is incorrect. In *Boise III,* under the heading "'Takings' by inverse condemnation under the Oregon Constitution," the court addressed whether Boise had stated a claim for a taking under Article I, section 18, of the Oregon Constitution. The court first explained that, "[t]o establish a [regulatory taking under Article I, section 18,] * * * [t]he property owner must show that the application of the government's particular choice deprives the owner of all *economically viable use of the property.* If the owner has 'some substantial beneficial use' of the property remaining, then the owner fails to meet the test." 325 Or. at 197-98, 935 P.2d 411 (emphasis in original; citations omitted). The court reasoned that Boise had met that test:

> "In this case, [Boise] has alleged in both its claims for relief that the Board's application of [the regulation] to its proposed logging plans denied [Boise] all economic use of its land. With respect to the first claim for relief, [Boise] has alleged 'depriv[ation] * * * of the only economically viable use of approximately 56 acres of merchantable timber.' Assuming the truth of all well-pleaded facts alleged in the complaint and giving [Boise] the benefit of all favorable inferences that may be drawn from those facts, that allegation is sufficient to meet the 'deprivation of all economically viable use of the property' standard."

Id. at 198, 935 P.2d 411.

But, for two reasons, that statement is not binding in the present controversy. First, the statement was made in the context of Article I, section 18. On

remand following that decision, Boise dropped its state constitutional claim, so any statement that the Supreme Court made regarding the viability of that claim is no longer at issue.[7] Second, in evaluating Boise's claim, the court had before it Boise's "supplemental complaint." That complaint, unlike the complaint at issue here, alleged a more general taking under the Fifth Amendment. That is, unlike the "second supplemental complaint" at issue now-which explicitly limits its allegations to a *per se* taking under *Lucas*-the complaint addressed by this court in *Boise II* and by the Supreme Court in *Boise III* included much more general allegations, allegations that could include a *Penn Central* claim:

"COUNT TWO

"(Inverse Condemnation-U.S. Constitution)

"The Board's denial of plaintiff's amended plan also constituted a taking of plaintiff's merchantable timber for a public purpose which requires just compensation under the Taking and Just Compensation Clause in the Fifth and Fourteenth Amendments to the U.S. Constitution."

Because the complaint at issue in *Boise III* was materially different from the complaint we now address, and because the court's statement in *Boise*

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[7] Indeed, in *Coast Range Conifers*, the Supreme Court explained that, in *Boise III*, "the state did not argue before this court that the whole parcel rule should apply, and this court did not address, much less purport to resolve, that issue." 339 Or. at 148, 117 P.3d 990.

III was limited to Boise's state constitutional claim, it is not "binding" or "conclusive" in this appeal.[8]

Boise's next argument in response to the state's arguments on cross-appeal is that the whole parcel rule applies even if only most of the parcel is taken. It asserts that, "even if the entire 65 acres is the 'whole parcel' by which the State's taking must be measured, the [state's] regulation deprived Boise of 96.7 percent of the fair market value of the entire 65-acre parcel. Moreover, the State prohibited logging of 56 of 65 acres, meaning that [Boise] was precluded from logging 86 percent of a 65-acre tract."

(Footnote omitted.) As authority for that view, Boise asserts that "*Lucas* recognized that deprivations that are 'one step short of complete,' 505 U.S. at 1019 n. 8 [112 S.Ct. 2886], and in particular takings of 95 percent of the economic value of property, may be compensable under the Fifth Amendment. *Id.*"

But that statement from *Lucas* does not help Boise here. In *Lucas*, the majority-in response to Justice Stevens's dissenting assertion that the whole parcel rule would have inequitable results-reiterated that its holding applies only to *per se* regulatory takings. The Court emphasized that an owner deprived of the use of most of its property might have a takings claim under the usual balancing approach of *Penn Central*. The Court went on to defend the whole parcel rule, even in the context of a property owner whose

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[8] Although, in *Boise II*, this court asserted that Boise had stated a claim under the federal constitution, that statement referred to the more general allegations in the earlier complaint, so, for the reason stated in the text, that statement also does not constitute the law of the case under the present circumstances.

property is reduced to five percent of its previous value by government regulation:

> "It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these all-or-nothing situations."

Lucas, 505 U.S. at 1019 n. 8, 112 S.Ct. 2886 (emphasis in original).[9] Like the property owner in *Lucas*, Boise has made no claim under *Penn Central*. With respect to categorical takings of the type that Boise has alleged, neither the United States Supreme Court nor the Oregon Supreme Court has ever applied an "almost" whole parcel rule under the Fifth Amendment.

"The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a 'complete elimination of value,' or a 'total loss,' the Court acknowledged, would require the kind of analysis applied in *Penn Central*." 535 U.S. at 330, 122 S.Ct. 1465 (citations and omitted).

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[9] In *Tahoe-Sierra*, the Court reiterated that, in *Lucas*, its "holding was limited to the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." 535 U.S. at 330, 122 S.Ct. 1465 (emphasis in original). The Court continued:

Finally, Boise argues that *Tahoe-Sierra* does not support the result we reach. It asserts that the analysis and holding in *Tahoe-Sierra* apply only to "planning moratoria on residential construction," and that they do not govern "a situation, such as this, in which there was a permanent ban on the use of commercial income property that was subsequently rescinded." In support of that reading of *Tahoe-Sierra,* Boise cites *Lucas* and *Seiber.* But no authority cited by Boise can sustain that narrow view.

As noted above, in *Boise V,* we described the holding in *Tahoe-Sierra* without any suggestion that it applies only to "planning moratoria on residential construction," and nothing in the *Tahoe-Sierra* opinion itself suggests such a crabbed reading. Nor does anything in *Seiber* suggest that a temporarily applicable regulation can support a *per se* taking under *Lucas.* Instead, the Federal Circuit in that case merely mentioned that temporary regulatory takings exist; it never suggested that such takings could be analyzed in any manner other than under *Penn Central.Seiber,* 364 F.3d at 1364. The discussion in *Lucas* to which Boise points is to the same effect. *Lucas,* 505 U.S. at 1030 n. 17, 112 S.Ct. 2886. In *Tahoe-Sierra,* the Court observed that "[r]ecovery under a *Penn Central* analysis is * * * foreclosed * * * because petitioners expressly disavowed that theory[.]" 535 U.S. at 334, 122 S.Ct. 1465. So, too, here. Boise chose to pursue only a federal claim, and only a *Lucas per se* takings claim, at that. Yet this is not the rare, "extraordinary case" in which a *Lucas* claim is appropriate, and the trial court erred in denying the state's motions for directed verdicts.

E. *Boise's Arguments on Appeal*

As noted, Boise makes a number of arguments on appeal. We do not address Boise's argument regarding the amount of interest on the award of compensation, as it is moot. We reject Boise's other arguments without discussion, except for one, which we address briefly. As noted above, while the state's motion for a plenary retrial was pending, Boise sought-five weeks before trial was scheduled to begin-to reinstate its state constitutional claim under Article I, section 18, a claim that it had voluntarily dismissed nearly seven years earlier. The state argued in response that (1) the claim was barred by the statute of limitations; (2) the dismissal of the claim had become final after *Boise V* and it could not now be revived; and (3) that it would be prejudiced by reinstatement of the claim. The trial court denied the motion, and Boise assigns error to that ruling.

On appeal, Boise presents two arguments as to why the trial court erred. First, it asserts that the statute of limitations does not bar the claim because it relates back to a timely filed claim. Second, according to Boise, the state would have suffered no prejudice had the trial court allowed the amendment. The state urges several grounds for affirmance: (1) the claim's dismissal became, as the state argued in the trial court, final after *Boise V*; (2) the allegations in the proffered complaint did not state a claim under Article I, section 18; (3) Boise's proposed amendment was untimely; and (4) the trial court did not, in any event, abuse its discretion in denying Boise's motion. Because we agree with the last of the state's contentions, we need not address the others.

In *Ramsey v. Thompson*, 162 Or.App. 139, 145, 986 P.2d 54 (1999), *rev. den.*, 329 Or. 589, 994 P.2d 130

(2000), we identified, in the context of judicial assessment of a motion to amend a complaint, "four considerations bearing on the appropriate exercise of discretion: (1) the nature of the proposed amendments and their relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendments and related docketing concerns; and (4) the colorable merit of the proposed amendments."

Here, although the claim was one that the state had seen before, it had been more than six years since Boise had voluntarily dismissed the claim, and the state had no reason to suspect until Boise moved to reinstate the claim that it would have to defend against it. At that stage of the proceedings, the state would have been prejudiced by Boise's virtually last-minute request to reinstate the claim. As the state explains, "[I]f Boise had been allowed to pursue its claim under the Oregon Constitution, that claim would have exposed the [state] to an award of attorney fees. * * * Had Boise not voluntarily dismissed its claim at the end of its first trial, the presence of that claim might have prompted the [state] to settle the case; to refrain from pursuing the appeal it pursued in *Boise V*; to seek increased discovery after the remand in *Boise V;* to invest more resources on certain potentially-dispositive motions and arguments; or to take actions that might have minimized the expenses incurred by Boise's attorneys. Because the [state] took-and refrained from taking-a number of actions based on circumstances that Boise created, it would be wholly unfair to now allow Boise once again to alter the legal landscape."

Furthermore, under the second and fourth factors articulated in *Ramsey*, the legal landscape at the

time of Boise's motion also supports the conclusion that the trial court did not abuse its discretion. At that time, this court had held that, in contrast to the federal constitution, the "whole parcel rule" did not apply to regulatory takings under the Oregon Constitution. *Coast Range Conifers v. Board of Forestry*, 189 Or.App. 531, 550, 76 P.3d 1148 (2003), *adh'd to on recons.*, 192 Or.App. 126, 83 P.3d 966 (2004), *rev'd*, 339 Or. 136, 117 P.3d 990 (2005). That difference would have required the state to litigate additional issues at trial and to appeal adverse rulings related to the applicability of the whole parcel rule under the Oregon Constitution. Additionally, the Supreme Court's subsequent holding in *Coast Range Conifers* that the whole parcel rule applies under Article I, section 18, casts significant doubt on the "colorable merit" of Boise's proposed claim.

Finally, the third *Ramsey* factor-the timing of the proposed amendment-supports the trial court's decision not to allow the amendment. After more than a decade of litigation, Boise sought-weeks before a second retrial—to reinstate a claim that it had voluntarily dismissed more than six years earlier. In opposing Boise's motion to amend, the state alternatively sought a continuance of the trial date, a request that posed obvious docket management issues for the trial court after an already lengthy procedural path to a final adjudication of the case. The trial court was entitled to rely on the late timing of Boise's request in deciding not to allow the amendment.

It is true, as Boise argues, that under ORCP 23 A, "leave [to amend] shall be freely given when justice so requires." But, "[t]he trial court has broad discretion in determining when justice requires amend-

ment to a complaint, and its decision will not be disturbed unless it is shown that the court exceeded the bounds of its discretion." *Contractors, Inc. v. Form-Eze Systems, Inc.*, 68 Or.App. 124, 129, 681 P.2d 148, *rev. den.*, 297 Or. 824, 687 P.2d 797 (1984). Here, taking into account all four of the *Ramsey* factors, we cannot say that the trial court abused its discretion in denying Boise's motion to reinstate its state law takings claim.

Affirmed on appeal; reversed on cross-appeal.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OREGON

Court of Appeals
A126743
S055621

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,
Cross-Respondent,
Petitioner on Review,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant-Respondent,
Cross-Appellant,
Respondent on Review.

ORDER DENYING REVIEW

Upon consideration by the court,

The court has considered the petition for review and orders that it be denied.

March 26, 2008 — DATE
/s/ Robert D. Durham — PRESIDING JUSTICE

* Kistler, *J.*, and Linder, *J.*, not participating

c: Denise G Fjordbeck
Phillip D Chadsey
Charles F Adams
P K Runkles-Pearson

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF OREGON
Clatsop County Circuit Court

[Filed May 7, 2008]

932018
A126743

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,
Cross-Respondent,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant-Respondent,
Cross-Appellant.

Paula J. Brownhill, Judge.

Argued and submitted January 4, 2007.

Philip D. Chadsey argued the cause for appellant-cross-respondent.

Denise G. Fjordbeck, Senior Assistant Attorney General, argued the cause for respondent-cross-appellant.

Before Edmonds, Presiding Judge, and Brewer, Chief Judge, and Carson, Senior Judge.

BREWER, C. J.

Brewer, C.J., *vice* Wollheim, J.

AFFIRMED ON APPEAL;
REVERSED ON CROSS-APPEAL.

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Prevailing party: Respondent on appeal; cross-appellant on cross-appeal.

[X] Costs allowed, payable by: Appellent on appeal; cross-respondent on cross-appeal.

MONEY AWARD

Judgment #1

Creditor(s):	State of Oregon Board of Forestry
Attorney:	Denise G. Fjordbeck, 1162 Court St NE, Salem OR 97301
Debtor(s):	Boise Cascade Corporation
Attorney:	Philip D. Chadsey
Costs:	$653.70
TOTAL AMOUNT:	$653.70

Interest: Simple, 9% per annum, from the date of this appellate judgment.

APPENDIX D

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

Case No. 93-2018

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

SPECIAL VERDICT

We, the jury, find as follows:

Question 1: Was Plaintiff Boise Cascade Corpoporation deprived of all economically viable use of its property within the protected area as a result of the Board of Forestry's order?

Yes ☒ No ☐

If your answer to Question 1 is "no," you are not to answer the following questions; return your verdict to the bailiff. If your answer to Question 1 is "yes," then you need to answer Question 2.

Question 2: Would it have been futile for Boise Cascade Corporation to seek an incidental take permit from the US Fish & Wildlife Service prior to February 1, 1993?

Yes ☒ No ☐

If your answer to Question 2 is "no," you also need to answer Question 3. If your answer is "yes" proceed directly to Questions 4 and 5.

Question 3: If the US Fish & Wildlife Service had issued Boise Cascade Corporation an incidental take permit, would the State Forester have approved plaintiff's plan to log?

Yes ☐ No ☐

If your answer to question 2 is "no" and your answer to question 3 is "yes" do not answer questions 4, 5, 6 and 7; return your verdict to the bailiff. If your answer to Question 3 is "no," proceed to Questions 4 and 5.

Question 4: If there was a temporary taking of Boise Cascade Corporation's property, when did the take begin?

15 Jan 1993 (date)

Question 5: If there was a tempora5ry taking of Boise Cascade Corporation's property, when did the take end?

17 Oct 1997 (date)

Proceed to questions 6 and 7.

Question 6: What was the fair market value of plaintiff's property when the take began?

$1,654,025

Question 7: What was the fair market value of plaintiff's property when the take ended?

$1,654,000

DATED this 21st day of May, 2004.

/s/ _____
Presiding Juror

APPENDIX E

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

Case No. 93-2018

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

GENERAL JUDGMENT

This case was tried to a 12-person jury between May 18-21, 2004 in Clatsop County Circuit Court, Circuit Judge Paula J. Brownhill presiding. The case went to trial on Plaintiff's Second Supplemental Complaint and the Answer filed by Defendant as to all claims that had not been adjudicated previously. Following trial, all claims in this case have been fully and finally adjudicated as follows:

Plaintiff's First Claim for Relief for Inverse Condemnation under the Oregon Constitution was voluntarily dismissed on plaintiff's own motion following the first trial of this case in 1997.

Plaintiff's Second Claim for Relief, County One (*Loretto per se*—U.S. Constitution) was the basis of the jury's verdict in the first trial. County One of the Second Claim was reversed and remanded by the Oregon Court of Appeals and is hereby dismissed.

Plaintiff's Second Claim for Relief, Count Two (*Lucas per se*—U.S. Constitution) was the subject of a grant of summary judgment prior to the first trial, which judgment was twice reversed and remanded by the Court of Appeals. County Two of the Second Claim for Relief was the only claim presented to the jury along with the affirmative defense of *ripeness* and the Plaintiff's excuse from that defense based on *futility*.

Defendant's Alternative Counterclaim (Declaratory Judgment) was dismissed at the first trial and was not re-tried and is hereby dismissed.

Based upon the special interrogatories answered by the jury on its verdict form, dated May 21, 2004, the plaintiff was deprived of all economically viable use of its property within the regulated area as a result of the defendant's order regarding spotted owl nesting protections, that it would have been futile to seek an incidental take permit from the US Fish & Wildlife Service, and that there was a temporary taking of the plaintiff's property between 15 January 1993 and 17 October 1997 with a difference in the fair market value of the property between those dates amounting to a loss of $25. The court finds that the plaintiff prevailed on its claim and is entitled to costs and disbursements, for this trial only.

THEREFORE, IT IS ADJUDGED that the Plaintiff shall have judgment in the sum of $25 as just compensation for the temporary taking of its property by the Defendant.

Plaintiff shall have judgment for costs and disbursements in the following amounts:

1.	Witness/Mileage Fees	
	a. David Cox	$ 75.10
	b. William Dryden	$251.40
	c. John Hampton	$ 72.45
	d. Bud Henderson	$ 35.00
	e. Marsha Seiber	$141.15
2.	Trial Exhibits Admitted Into Evidence	
	a. Blowups of Exhibits	$285.00
	b. Copying of Exhibits	$299.00
3.	2001 Summary Judgment	
	Transcript and Hearing Fee	$171.00
4.	Trial/Jury Fees	$912.00
	Total Costs & Disbursements:	$2,242.10
	Total Judgment Sum:	$2,267.10

DATED this 15th day of Nov., 2004.

/s/ _____
HONORABLE PAULA J. BROWNHILL

Submitted by: Paul J. Sundermier
Senior Assistant Attorney General

APPENDIX F

COURT OF APPEALS OF OREGON

93-2018; A115966

BOISE CASCADE CORPORATION,
a Delaware corporation,
Appellant,

v.

BOARD OF FORESTRY,
Respondent.

Argued and Submitted Nov. 14, 2002.
Decided Feb. 12, 2003.

Before HASELTON, *Presiding Judge*, and DEITS, *Chief Judge*,[1] and WOLLHEIM, *Judge*.

DEITS, C.J.

This appeal concerns the latest installment in an ongoing dispute between plaintiff Boise Cascade Corporation (Boise), and defendant Board of Forestry (board), that has been taking place for a decade. After our last remand of the case to the trial court, it denied Boise's motion for summary judgment and granted the board's motion for summary judgment. Boise appeals. As explained below, we conclude that the trial court properly denied Boise's motion for summary judgment, but that the board was not

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[1] Deits, C.J., vice Armstrong, J.

entitled to summary judgment either. We thus reverse and remand.

In May 1992, the board denied Boise's plan to harvest timber from a 56-acre portion of the "Walker Creek Unit" in Clatsop County in which a pair of northern spotted owls were nesting. Boise initiated this action for inverse condemnation in early 1993, alleging that, by failing to approve that plan, the board had "taken" certain timber in violation of Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. The trial court dismissed Boise's claims on the ground that it lacked subject matter jurisdiction and that Boise's complaint failed to state a claim. At virtually the same time, Boise petitioned for judicial review of the order disapproving the timber harvest and appealed the trial court's dismissal of its inverse condemnation claim. In the administrative review case, we rejected Boise's arguments concerning the validity of the administrative rule upon which the board based its decision and affirmed the order. *Boise Cascade Corp. v. Board of Forestry* (A78968), 131 Or.App. 552, 886 P.2d 1041 (1994), *aff'd*, 325 Or. 203, 935 P.2d 422 (1997) (*Boise I*). In the inverse condemnation case, we held that the trial court had erred in concluding that it lacked jurisdiction, and further held that Boise's complaint did state a claim. *Boise Cascade Corp. v. Board of Forestry (A79626)*, 131 Or.App. 538, 886 P.2d 1033 (1994) *(Boise II)*. On review of that case, the Oregon Supreme Court agreed with us in pertinent part that the court had jurisdiction and that Boise had stated a claim for a regulatory taking. *Boise Cascade Corp. v. Board of Forestry* (542159), 325 Or. 185, 935 P.2d 411 (1997) (*Boise III*).

On remand, Boise dropped its claim under Article I, section 18, of the Oregon Constitution. The trial court granted Boise partial summary judgment, ruling as a matter of law that a regulatory taking had occurred. Around that time, one of the nesting owls died, the other left the Walker Creek Unit, and the board lifted its temporary restriction on Boise's logging of the site. Boise's claim thus was transformed to a claim for a "temporary" taking.[2] Damages were tried to a jury, as was the question of whether a taking by "physical occupation" had occurred. After a jury verdict in Boise's favor, the board appealed.

In that appeal, the board argued that the trial court erred in failing to dismiss Boise's claim, in granting partial summary judgment, in striking its ripeness defense, and in numerous other respects. *Boise Cascade Corp. v. Board of Forestry*, 164 Or.App. 114, 116-18, 991 P.2d 563 (1999), *rev. den.*, 331 Or. 244, 18 P.3d 1099 (2000), *cert. den.*, 532 U.S. 923, 121 S.Ct. 1363, 149 L.Ed.2d 291 (2001) (*Boise IV*). In *Boise IV*, we agreed with the board on two of its arguments. First, we agreed that the trial court erred in submitting Boise's taking by "physical occupation" theory to the jury. 164 Or.App. at 126, 991 P.2d 563. Second, we agreed that the trial court erred in striking the board's defense that Boise's

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[2] We note that the legal landscape for "temporary" takings has changed significantly since this issue was initially presented to the trial court. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (a temporary restriction that merely causes a diminution in value of property is not a taking of the parcel as a whole; property is not rendered valueless by a temporary prohibition on economic use because the property will recover value as soon as the prohibition is lifted).

claim was not ripe because it had neither attempted to obtain an "incidental take permit" (ITP)[3] nor shown that attempting to obtain such a permit would have been futile. *Id.* at 128-32, 991 P.2d .563. We also rejected Boise's argument that its trial exhibits demonstrated that it would have been futile to try to obtain an ITP. First, we noted that trial exhibits were not relevant to whether the trial court erred in striking a defense from the pleadings. *Id.* at 133, 991 P.2d 563. Alternatively, we concluded that the exhibits on which Boise relied did not, in fact, demonstrate futility. *Id.* We thus reversed the verdict in favor of Boise and remanded the case. *Id.*

On remand, both parties sought summary judgment on the question of ripeness and futility. Most of Boise's arguments in support of summary judgment were to the effect that this court's decision concerning ripeness and futility in *Boise IV* was wrong. The trial court rejected those arguments and, to the extent that Boise repeats them at great length on this appeal, we reject them without further discussion. *See generally State v. Pratt*, 316 Or. 561, 569, 853 P.2d 827 (1993) (under the law of the case doctrine, "when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal"). Boise also argued in its motion for summary

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[3] The administrative rule under which the board had denied Boise's harvesting plan allowed an exception to the requirement for protecting northern spotted owl nesting sites if the operator had obtained an incidental take permit pursuant to the federal Endangered Species Act. *Id.* at 128, 991 P.2d 563.

judgment, however, that it was entitled to judgment as a matter of law on the question of futility. Boise suggested that the board, in asserting a ripeness defense, was required to demonstrate that, had Boise sought an ITP, the federal United States Fish and Wildlife Service (USFWS) would have granted it and, further, that the board then would have authorized the logging on the Walker Creek Unit. In support of its arguments, Boise relied on certain federal "guidelines for consideration of incidental take permits" that it asserted "call[ed] for the elimination of, and not the granting of permits for, timber sales that embrace active nesting sites." (Emphasis in original.) It also submitted materials from which it drew the conclusion that, even after the female owl died and the male owl moved away in 1997, "the USFWS *still* took the position that the Walker Creek site had not been abandoned under federal law." (Emphasis in original.) *But see* 186 Or.App. at 303 n. 5, 63 P.3d 605). Boise asserted that the USFWS's position in the late 1990s demonstrated that it would not have granted an ITP when Boise first sought to log the site many years earlier.

The board, in its motion for summary judgment, asserted that it was too late, as a matter of law, for Boise to be able to demonstrate futility. The gist of the board's argument on this point was that Boise was required to have made its "futility" showing concerning an ITP in the course of *Boise I*, the administrative case described above. The board argued that "estoppel" and "issue preclusion" prevented Boise from arguing in the present case that it would have been futile to attempt to obtain an ITP, because it maintained a position in *Boise I* that ITPs were not required for private lands. While the board maintained that Boise's showing on summary judg-

ment was insufficient to demonstrate futility as a matter of law, the board did not make any arguments other than those described above, or submit any exhibits, to show that it was entitled to summary judgment on the question of ripeness and futility as a matter of law.

The trial court granted the board's motion and denied Boise's motion. Its letter opinion indicated that it was denying Boise's motion on the ground that Boise had demonstrated nothing more than "predictions" about the likely success of an application for an ITP, and that it was granting the board's motion on the ground of "issue preclusion."

Boise appeals, arguing that the trial court erred in granting the board's motion for summary judgment and in denying its own motion. As noted above, we summarily reject Boise's attempts to relitigate the issue decided in the previous appeal concerning the availability of the ripeness defense, thus disposing of the majority of the arguments Boise asserts in this appeal. That leaves, as viable issues before us, Boise's argument that it was entitled to summary judgment as a matter of law on the board's ripeness defense and its argument that the board was not entitled to summary judgment as a matter of law on that defense.

In response, the board concedes that Boise's failure to litigate futility in *Boise I* does not preclude Boise from attempting to demonstrate fertility in this proceeding. The board acknowledges that that was the basis for the trial court's grant of its motion for summary judgment. The board argues, however, that "the trial court also dismissed because Boise failed to show that its claim was ripe * * * and failed to present sufficient evidence; of futility to raise a

factual issue and avoid summary judgment." The board also asserts as an alternative basis for affirmance that the trial court's grant of the board's motion for summary judgment was correct because Boise, having dropped it3 claim under Article I, section 18, of the Oregon Constitution, cannot, as a matter of law, establish a violation of the Fifth Amendment to the United States Constitution. *See generally Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982) (a federal takings claim does not ripen until the claim under Article I, section 18 has been decided).[4] Finally, the board asserts that, regardless of whether it was entitled to summary judgment, Boise nonetheless was not entitled to summary judgment on the futility issue based on the exhibits that it submitted.

We turn first to the board's asserted alternative basis for affirmance based on *Suess Builders Co.*, because it potentially would dispose of all issues in this case. As noted, this asserted basis for affirmance concerns a different theory of "unripeness" from the theory that the board pleaded as a defense and that served as the basis for our previous remand in *Boise IV*. In *Boise II*, 131 Or.App. at 540 n. 2, 886 P.2d 1033, we noted that ripeness issues are not jurisdictional, and that they generally must be presented as matters of defense. Here, while the board did assert a ripeness defense below, it was not the same ripeness defense it now sets forth. We conclude that an entirely new ripeness defense that was not raised in the lower court cannot serve as an

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[4] *Accord Bailey v. U.S. Army Corps of Engineers*, --- F.Supp. ---, 2002 WL 31728947 (D.Minn.2002) (federal takings claim was not ripe because plaintiff failed to pursue an inverse condemnation action based on state constitution).

alternative basis for affirmance on appeal. In *Rogers v. Valley Bronze of Oregon, Inc.*, 178 Or.App. 64, 68-69, 35 P.3d 1102 (2001), we concluded that a new theory of defense of failure to state a claim under ORCP 21 A(8) could not be advanced in the first instance on appeal, given the rationale of *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 381, 8 P.3d 200 (2000), *adhered to on recons*, 331 Or. 595, 18 P.3d 1096 (2001), that ORCP 21 G(3) requires such a defense to be made "in any pleading permitted or ordered under Rule 13 B or by motion for judgment on the pleadings or at trial on the merits." That holding is controlling here. The board's ripeness defense based on *Suess Builders Co.* is, in essence, a defense of failure to state ultimate facts sufficient to constitute a claim, ORCP 21 A(8). As such, it must be raised under the circumstances specified in ORCP 21 G(3). In *Rogers*, we noted that an "appeal from an order granting a motion to dismiss is not one of the limited circumstances in which a defendant may assert a new defense of failure to state ultimate facts constituting a claim." 178 Or.App. at 69, 35 P.3d 1102. Neither is an appeal from a summary judgment.

We thus turn to the first issue raised in Boise's appeal—whether the board was entitled to summary judgment. As noted, the trial court granted the board's motion based on its argument that Boise was estopped or precluded from demonstrating futility now, because it should have done so when it was litigating the administrative case, *Boise I*. For the following reason, we accept the board's concession that the trial court erred in granting its motion for summary judgment based on "issue preclusion." Issue preclusion applies when:

"1. The issue in the two proceedings is identical.

"2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.

"3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.

"4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.

"5. The prior proceeding was the type of proceeding to which this court will give preclusive effect."

Nelson v. Emerald People's Utility Dist., 318 Or. 99, 104, 862 P.2d 1293 (1993) (citations omitted).

The problem here is with the first criterion. *Boise I* concerned the validity of a state administrative rule that, in turn, referenced the need for an ITP from the federal government. 131 Or.App. at 554-55, 886 P.2d 1041. While Boise certainly attempted to litigate aspects of "takings" in *Boise I*, it was seeking to have the portion of the administrative order that discussed regulatory takings declared invalid. *Id.* It was not, in the administrative proceeding, seeking just compensation for a taking by inverse condemnation. Thus, it did not, and was not required to, litigate whether such an inverse condemnation was "ripe" or

whether an application for an IT? would have been "futile."[5]

Finally, we address the board's argument that the trial court, although stating that it was granting summary judgment on the basis of "issue preclusion," also granted the board's motion for summary judgment because Boise "failed to present sufficient evidence of futility to raise; a factual issue and avoid summary judgment." We disagree with the board's characterization of the trial court's ruling. The board's motion for summary judgment simply did not attempt to put Boise's evidence to the test on that point. As noted above, the board's summary judgment argument was that Boise, as a matter of law, was precluded from *making* a futility showing—it did not argue that Boise could not, as a matter of fact, actually show futility. Thus, we reject the board's argument that it was entitled to summary judgment based on the sufficiency—or lack thereof—of Boise's evidence of futility.

The only remaining question, then, is whether the trial court erred in denying Boise's motion for summary judgment. That motion—in contrast to the board's motion—did raise the issue of whether Boise's evidence demonstrated that it was entitled to judgment as a matter of law on the board's ripeness defense because applying for an ITP would have been futile. We conclude that Boise's evidence was not

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[5] We note, moreover, that "futility" is a response to a "ripeness" defense. The board has not asserted here that it raised any sort of ripeness defense in *Boise I*. Thus, the board also has not demonstrated that "futility" was an issue that was "essential to a final decision on the merits in the prior proceeding." *Nelson*, 318 Or. at 104, 862 P.2d 1293.

sufficient to entitle it to summary judgment on that point.

As an initial matter, we point out that, in evaluating Boise's motion for summary judgment, we view the evidence in the light most favorable to the opposing party, the board. ORCP 47 C; *see Jones v. General Motors Corp.*, 325 Or. 404, 939 P.2d 608 (1997). In light of that standard of review, many of Boise's arguments make little sense. Boise seems to be asserting that, in order to avoid summary judgment in Boise's favor, the board was required to show that "in 1993, the USFWS would have granted Boise an ITP" and that, "if an ITP had been issued, the board would have exercised its discretion and authorized the logging." Boise also suggests that "futility" is evaluated based on a "more likely than not" or "preponderance of the evidence" standard. Thus, Boise suggests, if the evidence demonstrates that it is more likely than not that the USFWS would have denied its application for an ITP in 1992 or 1993, then Boise was entitled to summary judgment as a matter of law. Boise's assertions demonstrate a fundamental misunderstanding not only of the "futility" doctrine, but of burdens of proof and the summary judgment process.

It is the plaintiff, not the defendant, who bears the burden of demonstrating futility. *See, e.g., Curran v. ODOT*, 151 Or.App. 781, 788, 951 P.2d 183 (1997) ("To prevail on a futility argument, plaintiffs had to submit evidence that would support a finding that there were no other reasonable locations for an access road."). Moreover, a plaintiff seeking summary judgment on a ripeness defense based on its evidence of futility must demonstrate that there is no genuine issue of material fact that the further

actions that the defendants are contending are necessary for ripening of a claim would have been futile. It is at least possible that Boise could be said to have met such a standard if it were correct that futility can be established with evidence that it is "more likely than not" that USFWS would have denied an application for an ITP in 1992 or 1993. However, Boise cites no authority, and we are aware of none, that stands for the proposition that the test for futility is indeed that it is "more likely than not" that an application would have been denied.

Case law from the United States Supreme Court concerning the futility exception to the ripeness doctrine has not specified in great detail the quantum of evidence required to establish futility. However, that case law, as well as the plain meaning of the word "futile," lead to a conclusion that futile does not equate to "more likely than not." The common meaning of the word "futile" is "serving no useful purpose: INEFFECTIVE, FRUITLESS." *Webster's Third New Int'l Dictionary* 925 (unabridged ed. 1993). "Futility" is defined as "an abortive attempt or useless gesture." *Id.* The Court's most recent pronouncement on the subject, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), was that "federal ripeness rules do not require the submission of further and futile applications with other agencies." An examination of the facts of that case sheds light on what the Court meant by the word "futile." In *Palazzolo*, a landowner owned property that, under state law, was considered protected wetland on which filling was prohibited. 533 U.S. at 614, 121 S.Ct. 2448. There existed an exception only if a "compelling public purpose" would be served by the filling. *Id.* A state agency denied the landowner's proposed use, finding that it did not

satisfy the "compelling public purpose" standard. In rejecting the board's argument that the landowner's claim was not ripe because he had not submitted applications for other types of development on the land, the Court stated:

> "On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point."

Id. at 621, 121 S.Ct. 2448. In sum, further applications under those circumstances would have been futile because the state law in question allowed for only one exception, for a "compelling public purpose," and the board already had determined that that exception did not apply. Thus, "futile," as used by the Court in *Palazzolo*, meant "serving no useful purpose." *Webster's* at 925.

A comparison of *Palazzolo* to *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), is instructive. That case also concerned ripeness. There, a developer was attempting to develop a residential subdivision for which its predecessor had received a preliminary approval from local government. *Williamson Planning Commission*, 473 U.S. at 177, 105 S.Ct. 3108. Over the next few years, parts of the proposed development were given final approval and built. *Id.* at 178, 105 S.Ct. 3108. In light of mistakes discovered in the original preliminary approval, the local government asked the developer to submit a revised preliminary plat. The local government

rejected the revised plat on the ground that it did not comply with various ordinances and regulations. *Id.* at 180-81, 105 S.Ct. 3108. The developer then brought an action pursuant to 42 U.S.C. section 1983, alleging a taking without just compensation. The Court held that the developer's claim was not ripe:

> "[R]espondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that *variances could have been granted* to resolve at least five of the Commission's eight objections to the plat."

Williamson Planning Commission, 473 U.S. at 188, 105 S.Ct. 3108 (emphasis added). The Court rejected the developer's argument that denial of approval of the plat "was equivalent to a denial of variances." *Id.* It noted that the regulations in question clearly stated that "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." *Id.* at 189, 105 S.Ct. 3108. The Court concluded:

> "Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted."

Id. at 190, 105 S.Ct. 3108. Thus, in *Williamson Planning Commission*, there was no "futility"

exception to the ripeness requirement because it appeared to the Court that "variances *could* have been granted" that would have allowed the development to occur. 473 U.S. at 188, 105 S.Ct. 3108. The Court did not speculate on whether it was "more likely than not" that such variances would be granted. *See also Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 740, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) (regulatory taking claim was ripe where "little or no uncertainty" remained as to the value of the petitioner's "transferable development rights"); *MacDonald, Somers Frates v. County of Yolo*, 477 U.S. 340, 352, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) (taking claim was not ripe where there was "le[ft] open the possibility that some development will be permitted").

In sum, while the Court's cases do not precisely quantify futility, the Court has found futility where development required filling but, under the laws, there could be "no fill for any likely or foreseeable use," *Palazzolo*, 473 U.S. at ——, 121 S.Ct. 2448, and where there was "little or no uncertainty" as to the value of certain development rights, *Suitum*, 520 U.S. at 740, 117 S.Ct. 1659; but *not* where there was left open "the possibility of some development," *MacDonald*, 477 U.S. at 352, 106 S.Ct. 2561; or where "variances could have been granted" that might have permitted development, *Williamson Planning Commission*, 473 U.S. at 188, 105 S.Ct. 3108. Synthesizing the holdings in those cases, we conclude that, where there remains an unexplored possibility under the regulations in question that development can occur, a claim is not ripe and the "futility" exception will not apply unless the party claiming futility can show that there was very little likelihood—or no likelihood—that the development

would have been approved had that party taken further steps to obtain approval.

With that standard in mind, we examine the exhibits that Boise submitted in support of its claim for summary judgment on the state's ripeness defense. Most of the exhibits simply are not relevant in any significant way to the question before us. Many contain bits and pieces of pleadings and arguments made in several other cases concerning timber harvesting. Those isolated excerpts do not in any way shed light on whether Boise could have obtained an incidental take permit from USFWS in 1992 or 1993 for harvesting timber in the Walker Creek Unit. Boise also submitted excerpts from an action it brought in federal court, apparently in 1998, in an effort to obtain an advisory opinion from USFWS as to whether it would be in violation of the Endangered Species Act were it to log the Walker Creek Unit.[6] The material submitted demonstrates nothing except that, as early as 1998, the USFWS had not taken a position on whether such a project would violate the act. Particularly in light of the fact that Boise did not actually apply for an ITP until November 1998,[7] we conclude that that material

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[6] As noted above, by that point in time, the board was no longer taking the position that the unit should not be logged. By 1998, the owls that were present in 1992 and 1993 were no longer on the site. It appears, however, that later litigation between Boise and USFWS about the Walker Creek Unit may have concerned the presence of another owl found dead on the site long after the events at issue in this case. *See generally Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed.Cir.2002).

[7] USFWS indicated that Boise could proceed with the logging in July 1999.

simply is not relevant to determining the likelihood of Boise receiving an ITP in 1992 or 1993.

Two remaining exhibits submitted by Boise in support of its motion for summary judgment merit discussion. The first is a document labeled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl, U.S. Fish and Wildlife Service, Region 1, July 1990." Boise does not dispute that those guidelines were rescinded in 1992, before the controversy at issue here arose, but appears to maintain that the USFWS might have continued to rely on them. These guidelines appear to relate primarily to planned and proposed sales of timber on federal lands. They contain numerous recommendations, only one of which is relevant here: "[I]f incidental take is identified as a concern on state or private lands, individual landowners should consider development of a habitat conservation plan." The document says nothing about the likelihood of the issuance of ITPs in any particular circumstances. While the recommendations do reflect a general concern for preservation of spotted owl habitat, even assuming that USFWS continued to consult those guidelines after they were rescinded, they do not provide any basis for speculating on whether a private landowner's application for an ITP would have been successful in 1992 or 1993. The other exhibit is part of a document entitled "Recovery Plan for the Northern Spotted Owl—Draft," dated April 1992. The pages of the draft submitted by Boise detail a decline in northern spotted owl habitat in western Oregon. Again, while the draft expresses USFWS's concern for preserving owl habitat, it does not provide information pertaining to the likelihood of Boise obtaining an ITP.

We thus conclude that Boise was not entitled to summary judgment as a matter of law on the board's ripeness defense. In sum, neither party was entitled to summary judgment based on the theories that each advanced and on the exhibits submitted to the trial court.

Summary judgment in favor of defendant reversed and remanded.

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF OREGON
Clatsop County Circuit Court

Case No. 93-2018
SC S50346
CA A115966

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,
Petitioner for Review,

v.

BOARD OF FORESTRY,
Defendant-Respondent,
Respondent on Review.

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

Dated this 29th day of July 2003.

/s/ Wallace P. Carson, Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

De Muniz and Balmer, JJ., Not Participating

c: Scott E. Crawford
Phillip D. Chadsey
David Farris Coursen

APPENDIX H

Paula J. Brownhill, Circuit Judge
(503) 325-8555
Philip L. Nelson, Circuit Judge
(503) 325-8536

CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP
Clatsop County Courthouse
749 Commercial
PO Box 659
Astoria, OR 97103

September 3, 2001

William F. Cloran
Assistant Attorney General
Trial Division
Department of Justice
1162 Court Street, NE
Salem, Oregon 97310

Phillip D. Chadsey
Attorney at Law
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268

Re: *Boise Cascade v. Department of Forestry*
Case No. 93-2018

Dear Mr. Cloran and Mr. Chadsey:

I heard arguments on the motions for summary judgment on July 23, 2001. I have reviewed plaintiff's reply memorandum in support of its motion for summary judgment and Mr. Chadsey's supplemental affidavit, and I read *Palazzo* and several other cases. I will grant the state's motion for summary judgment on both the Loretto and Lucas claims. Mr. Cloran should prepare the judgment.

SUMMARY OF THE CASE

After the jury returned a verdict for plaintiff on its inverse condemnation claim, the state appealed. The court of appeals found that I erred in striking the state's ripeness defense (the defense was that plaintiff's claim was not ripe because plaintiff failed to obtain an incidental take permit from federal authorities under the Endangered Species Act in 1992). Plaintiff responded with several arguments, including futility, all of which the court of appeals rejected.

The case was remanded, and plaintiff and defendant filed motions for summary judgment. Plaintiff agreed the state's motion for summary judgment should be granted on the Loretto claim. The state argued the Lucas claim is not ripe and never can be and Boise Cascade is precluded by the doctrine of equitable estoppel from claiming futility. Plaintiff argued it was not required to seek an incidental take permit under *Palazzo* and it would have been futile to seek an incidental take permit in any case.

CONCLUSIONS

In *Palazzo v. Rhode Island*, 121 SCt 2448 (2001), the U. S. Supreme Court held that the Rhode Island Supreme Court erred in ruling that plaintiff's claim

was not ripe because it failed to explore other uses for the property when its application to fill wetlands was denied. It repeated the holding in *Williamson Planning Commission v. Hamilton Bank*, 473 US 172 (1985), that federal ripeness rules do not require the submission of further and futile applications with other agencies.

The Oregon Court of Appeals' 1999 opinion cited *Williamson* and other cases discussed in *Palazzo*. Given the court of appeals' interpretation of *Williamson*, it is unlikely it would decide this case differently after *Palazzo*.

I agree with the state's arguments regarding issue preclusion. Issue preclusion typically applies when: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; and (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding. *Nelson v. Emerald People's Utility District*, 318 Or. 99, 104 (1993); *State Farm Fire and Casualty v. Reuter*, 299 Or. 155, 158-59 (1985). All of those criteria are satisfied in this case.

Although the court of appeals was discussing a motion to strike the defense of ripeness when it rejected plaintiff s futility argument, its comments about futility in *Larson v. Multnomah County*, 121 Or App 119, 122 (1993) indicate its approach to the subject:

> "We further concluded, in *Joyce* and *Dority*, that arguments based on the futility exception to the ripeness rule should seldom be entertained and

should not ever be considered if they amount to nothing more than predictions about the success of applications to the local governments."

For these reasons, the plaintiff's motion for summary judgment is denied; defendant's motion for summary judgment is allowed. The court will cancel the September 11, 2001 trial.

Yours truly,

/s/ _____
Paula Brownhill

APPENDIX I

COURT OF APPEALS OF OREGON

93-2018; CA A100855

BOISE CASCADE CORPORATION,
a Delaware corporation,
Respondent,

v.

STATE OF OREGON, by and through the
OREGON STATE BOARD OF FORESTRY,
Appellant.

Argued and Submitted Feb. 22, 1999.
Decided Nov. 10, 1999.

Appeal after remand from Circuit Court,
Clatsop County
Paula J. Brownhill, Judge

John T. Bagg, Assistant Attorney General, argued the cause for appellant. With him on the briefs were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Phillip D. Chadsey, Boise, ID, argued the cause for respondent. With him on the brief were Charles F. Adams and Stoel Rives LLP.

Daniel Kearns, Portland, Reeve Kearns PC, and John D. Echeverria, San Francisco, CA, filed a brief *amicus curiae* for Audubon Society of Portland.

Brent D. Boger, Robin L. Rivett, and Eric Grant, Sacramento, CA, filed a brief amicus curiae for Pacific Legal Foundation, Oregon Farm Bureau, and California Farm Bureau Federation.

Before De MUNIZ, Presiding Judge, and DEITS, Chief Judge, and ARMSTRONG, Judge.

De MUNIZ, P.J.

The state appeals from a jury verdict in favor of plaintiff Boise Cascade (Boise) on its claim for a temporary taking of a stand of timber in which a pair of northern spotted owls were nesting. For the following reasons, we reverse and remand.

In 1988, Boise acquired 1,770 acres of commercial timberlands in Clatsop County and conducted some logging activities on its property. Also in 1988, the Oregon Department of Fish and Wildlife designated the northern spotted owl as a threatened species. In 1990, the State Forester adopted an administrative policy precluding timber harvesting within a 70-acre area around known spotted owl nesting sites, ultimately codified as *former* OAR 629-24-809.[1] In 1991,

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[1] *Former* OAR 629-24-809 provided, in part:

> "(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> "(a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat[.]"

A substantially similar rule is currently found at OAR 629-665-0210.

Boise sold all of those commercial timberlands except for a 64-acre parcel (the Walker Creek site), which the buyer refused to accept due to the presence of a northern spotted owls' nest on the site. The present dispute centers around the state's refusal to permit logging on the Walker Creek site during the period that the spotted owls were nesting there.

A spotted owl had been seen on the Walker Creek site in 1986, and a pair of spotted owls nested on the site in 1990, hatching two offspring. Another spotted owl was seen on the site in 1991. A breeding pair was present on the site in 1992. In early 1992, Boise sought approval from the State Forester of its plan to harvest the timber on the site. The State Forester did not approve Boise's harvesting plan because the plan did not identify for protection 70 acres of suitable spotted owl habitat encompassing the nesting site at Walker Creek. The Board of Forestry upheld the denial of Boise's plan on the ground that the proposed plan failed to comply with *former* OAR 629-24-809. A subsequent plan permitted Boise to log several acres of the Walker Creek site but only during time frames when no owls were nesting on the site.

Boise initiated this action for inverse condemnation, arguing that the refusal to permit it to log the Walker Creek site constituted a taking under Article I, section 18, of the Oregon Constitution, as well as under the Fifth Amendment, as applied to the states through the Fourteenth Amendment, of the United States Constitution. Boise further alleged that the restriction on logging the other acres during the owl nesting season was a temporary taking under both constitutions. The trial court dismissed the complaint. On appeal, we reversed, *Boise Cascade Corp.*

v. Board of Forestry, 131 Or.App. 538, 886 P.2d 1033 (1994), and the Supreme Court allowed review. On review, the Supreme Court affirmed in part and reversed in part, concluding that, although Boise failed to state a claim for a temporary taking of the small amount of timber that the Board of Forestry permitted to be logged, Boise did state a claim for a taking of the remainder of the Walker Creek site. *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 935 P.2d 411 (1997).[2]

On remand, Boise dropped its claim under the Oregon Constitution and proceeded only on its federal constitutional claim. Boise moved for partial summary judgment, and the trial court ruled as a matter of law that a regulatory taking had occurred. The question of damages was tried to a jury, as was a question as to whether a taking by "physical invasion" had occurred. Meanwhile, one of the spotted owls on the Walker Creek site had died and the other had left the site, and all restrictions on logging the site were lifted. The jury returned a verdict for Boise, and the trial court entered judgment for Boise in the amount of $2,279,223 in damages for the temporary restriction on its logging of the Walker Creek site. This appeal ensued.

On appeal, the state makes numerous arguments that the trial court erred in failing to dismiss the claim, in granting partial summary judgment, in limiting the state's evidence, in instructing the jury, and in various other regards. We turn first to the state's argument that the trial court lacked jurisdiction by

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[2] The court's decision covered other subjects as well, but they are not pertinent to this appeal.

reason of the Eleventh Amendment to the United States Constitution.

The state argues that there is no direct right of action under the Fifth and Fourteenth Amendments to the United States Constitution against the state in a state court. The state maintains that, although Congress can, and has, abrogated the states' immunity from suit by way of its power to enforce the Fourteenth Amendment, Boise has not pleaded its case under any statute that abrogates the state's immunity, *e.g.*, 42 USC section 1983. Although the state acknowledges that a number of takings claims under the federal constitution have proceeded in Oregon courts throughout the years, it argues that the sovereign immunity question was not raised and thus was not addressed in those cases.

Boise responds that, although the Eleventh Amendment may bar plaintiffs from pursuing federal constitutional claims against states in federal court, it "has nothing to do with barring a plaintiff from bringing a takings claim against the State, based on the federal constitution, in the Oregon courts[.]" Until quite recently, Boise's position on this question seemed unassailable. *See, e.g., Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 204-05, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) ("But as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'"). However, in a recent series of cases, the United States Supreme Court has significantly altered its position on the question of states' sovereign immunity. Most directly on point is *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), which concerned an attempt by state employees to enforce the Fair Labor Standards Act (FLSA), 29 USC section 201 et seq., against the

state in a state court proceeding. Although the FLSA contains a provision purporting to authorize actions against states in their own courts, the Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 119 S.Ct. at 2246.

The Court first acknowledged that the text of the Eleventh Amendment does not actually address the question of when a state may be sued in its own courts.[3] *Id.* However, after reviewing at length the history of the Tenth and Eleventh Amendments, and its own earlier case law upholding the states' "sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment," *id.* at 2253, the Court concluded that basing decisions concerning states' immunity on the text of the amendment alone would constitute "ahistorical literalism[.]" *Id.* at 2254. Although acknowledging Congress's power to enact legislation such as the FLSA via the Commerce Clause, the Court concluded that Congress did not have the power to abrogate states' sovereign immunity in doing so. *Id.*

The Court went on to indicate, though, that sovereign immunity would "not bar all judicial review of state compliance with the Constitution[.]" *Id.* at 2266. In particular, the Court pointed out:

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[3] The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

"We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick v. Bitzer*, 427 U.S. 445[, 96 S.Ct. 2666, 49 L.Ed.2d 614] (1976). By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.' *Seminole Tribe [of Fla. v. Florida*, 517 U.S. 44, 59, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)]. When Congress enacts appropriate legislation to enforce this Amendment, *see City of Boerne v. Flores*, 521 U.S. 507[, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. *Fitzpatrick, supra*, at 456 [96 S.Ct. 2666]." *Alden*, 119 S.Ct. at 2267.

In summary, the Court has declared that, even if a state has not waived its sovereign immunity, Congress may, pursuant to the enforcement power granted it by section 5, of the Fourteenth Amendment,[4] enact

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[4] The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> " * * * * * *
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

legislation to enforce constitutional rights that have been made applicable to the states through the Fourteenth Amendment. It is not disputed that the just compensation clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. The question, then, is whether plaintiff's only remedy for the constitutional violation it alleges is through a positive enactment of Congress, such as 42 USC section 1983, as the state posits.

The parties cite no provision other than 42 USC section 1983 as an affirmative act of Congress that would abrogate the states' sovereign immunity and subject it to takings claims in state courts, and we are aware of none.[5] However, we do not find the state's answer to this issue--that plaintiff failed to state a claim because it did not proceed under 42 USC section 1983--to be satisfactory. Section 1983 actions may be brought against "persons," but a state is not a "person" for purposes of section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). As noted above, though, the Fourteenth Amendment provides that no "*state* [shall] deprive any person of * * * property, without due process of law," and the Fifth Amendment, incorporated as to the states through the Fourteenth Amendment, calls for "just compensation" for a taking of property. (Emphasis added.) In short, section 1983 does not provide for the remedy required

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[5] The state concedes that Congress has authority to subject it to suit in state court without its consent. We recognize that *Alden* may well be read to indicate otherwise, but we will treat the state's concession in this case as a partial waiver of any sovereign immunity defense that it is immune from suit in state court even if Congress has the authority to subject it to suit in federal court.

by the constitution for a taking of property by the *state*.

Thus, the question comes down to whether Boise can maintain an inverse condemnation action against the state in state court, based on an alleged violation of the Fifth Amendment to United States Constitution, in the absence of congressional action pursuant to section five of the Fourteenth Amendment authorizing such an action. As a general matter, the *Alden* decision discussed above might suggest that the answer is "no," because of its emphasis on positive acts of Congress under section five of the Fourteenth Amendment. However, certain language in the *Alden* decision, particularly when read in conjunction with some of the Court's earlier case law describing the Fifth Amendment as "self-executing," casts doubt on such a conclusion. In *Alden*, the Court distinguished the issue before it from the issue presented in *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994):

> "In *Reich v. Collins*, 513 U.S. 106 [115 S.Ct. 547, 130 L.Ed.2d 454] (1994), we held that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be a 'clear and certain' postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. *Id.* at 108 [115 S.Ct. 547]. This case arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a 'clear and certain' postdeprivation remedy. *Ibid.*; *see also Fair Assessment in Real Estate Assn., Inc. v.*

> *McNary*, 454 U.S. 100[, 102 S.Ct. 177, 70 L.Ed.2d 271] (1981). *In this context, due process requires the State to provide the remedy it has promised. Cf. Hudson v. Palmer*, 468 U.S. 517, 539[, 104 S.Ct. 3194, 82 L.Ed.2d 393] (1984) (O'Connor, J., concurring). *The obligation arises from the Constitution itself*; *Reich* does not speak to the power of Congress to subject States to suits in their own courts." *Alden*, 119 S.Ct. at 2259 (emphasis added).

Although Reich has little direct bearing on the issue before us, as it did not involve any issues of sovereign immunity, the Court's description of *Reich* in *Alden* strongly suggests that states may be required to provide promised remedies in state court proceedings by force of the Due Process Clause alone.

Further support for this idea that the Constitution itself may dictate the availability of remedies in state court under certain circumstances can be found in First *Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Although *First Lutheran* did not squarely present the type of sovereign immunity issue with which we are confronted, it provides significant guidance on the issue. In *First Lutheran*, the plaintiff sued a county after it adopted an interim ordinance that temporarily banned construction within a flood zone. 482 U.S. at 307- 08, 107 S.Ct. 2378. The focus of the case was whether a temporary regulatory taking constituted a taking under the Fifth Amendment. It does not appear from the text of the opinion that a sovereign immunity defense was raised. However, the Solicitor General, an *amicus* in the case, did make a sovereign immunity argument that the Court addressed:

"We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation * * *.' *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980), quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev ed 1972). As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. [621], 654-55, 101 S.Ct. 1287, 67 L.Ed.2d 551 [(1981)], it has been established at least since *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933), that claims for just compensation are grounded in the Constitution itself:

"'The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*' *Id.* at 16, 54 S.Ct. 26, 78 L.Ed. 142. (Emphasis added [by *First Lutheran* court]).'

"*Jacobs*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is

required by the Constitution. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306, 43 S.Ct. 354, 67 L.Ed. 664 (1923); *Monongahela Navigation [Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893).[6]

Piecing together the Court's various statements in *First Lutheran* with its description of *Reich* in *Alden*, we conclude that the Court, in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved. We recognize that our conclusion on this point is not beyond dispute. *See, e.g., Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992), *cert.*

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[6] "The Solicitor General urges that the prohibitory nature of the Fifth Amendment * * * combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. *See San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655 n. 21, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting), quoting *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947)." *First Lutheran*, 482 U.S. at 315-16, 316 n. 9, 107 S.Ct. 2378.

den. 506 U.S. 1081, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993) (Takings plaintiff had "no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 USC 1983[.]"). However, particularly in light of the Court's rejection of the *amicus curiae's* sovereign immunity argument in *First Lutheran*, and in light of the fact that the state has explicitly disavowed any reliance on *Alden* in the present case, we conclude that *Alden* should not be read so broadly as to dictate that states may not be sued in state courts on federal takings claims unless they have specifically waived their sovereign immunity. We conclude that, because of the "self-executing" nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state court for takings in violation of the federal constitution.

The state next argues that the trial court erred in denying its motion to dismiss for failure to state a claim under either of two theories: the *Lucas* theory (deprivation of all beneficial use of property) and the Loretto theory (physical occupation of property). *See generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). To state a claim under the Fifth Amendment for a taking under a *Lucas* theory, the property owner must allege that a governmental action has deprived the owner of all economically beneficial use of the property. Both this court and the Oregon Supreme Court concluded that plaintiff had stated a claim under this type of theory in the course of the previous appeal. *See Boise Cascade*, 131 Or.App. at 551, 886 P.2d 1033 ("plaintiff alleges, in essence, that the gov-

ernment has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under * * * *Lucas*"); *Boise Cascade*, 325 Or. at 198, 935 P.2d 411 (Plaintiff's allegations were "sufficient to meet the 'deprivation of all economically viable use of the property' standard. The Court of Appeals was correct in so holding."). Although plaintiff amended its pleadings after remand, the amended pleadings, insofar as the *Lucas* theory of recovery is concerned, are much the same as its pleadings discussed in the previous appellate decisions in this case. Plaintiff alleged that the state has regulated its property in such a way that all viable economic and beneficial use of the property was eliminated. The trial court properly denied the state's motion to dismiss on the ground that plaintiff failed to state a claim under the Lucas theory.

The state also moved to strike plaintiff's allegations that it had suffered a *per se* taking by means of a "permanent physical occupation" in violation of the Fifth Amendment. In its complaint, plaintiff alleged that the administrative rules described above required plaintiffs to maintain spotted owl nests and prevent their abandonment so the nests could be occupied annually by a pair of breeding owls and that the state's denial of plaintiff's plan to harvest the timber constituted a *per se* taking.

The *Loretto* case concerned "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments." 458 U.S. at 421, 102 S.Ct. 3164. The state argues that the court

erred in denying its motion to strike this count of plaintiff's claim because plaintiff has not alleged the type of physical occupation at issue in *Loretto*. We agree.

In *Loretto*, the challenged statute required landlords to permit cable television companies to install devices on their property. *Id.* There, the Court recounted at length the historic distinctions between takings involving permanent physical invasion of property and regulations that place restrictions on the use of property. 458 U.S. at 427-35, 102 S.Ct. 3164. One of the early physical invasion cases that the Court discussed in *Loretto* was *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 20 L.Ed. 557 (1871), in which the Court held that "where real estate is actually invaded by *superinduced* additions of water, earth, sand or other material, or by having any *artificial* structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking[.]" (Emphasis added.) *Pumpelly* involved a situation where the government *caused* a party's land to become flooded. However, the Court's "physical occupation" jurisprudence in no way suggests that the same takings analysis would apply where, for example, a natural flood occurred and government regulations pertained to how a landowner was to deal with floodwaters on his or her land. *Compare Pumpelly*, 80 U.S. at 177-78 (where government caused property to flood by constructing a dam, there was a taking by "physical occupation"), *with First Lutheran*, 482 U.S. at 308, 107 S.Ct. 2378 (where flood occurred as a consequence of a forest fire destroying a watershed area, government regulation of construction within flood zone was analyzed under regulatory takings case law).

As the state points out, there are significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest. The natural occurrence of a pair of breeding spotted owls on a piece of property is more akin to the naturally occurring flood in our hypothetical described above than to a flood caused by the government's construction of a dam, as was the case in *Pumpelly*, or to the installation of an artificial structure such as a cable television box, as was the case in *Loretto*.

The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there. Although plaintiffs have stated a claim for a regulatory taking, they have not stated a claim for a "physical occupation" taking under *Loretto*. The trial court erred in concluding otherwise.

However, that conclusion does not end our inquiry. As noted, plaintiff pleaded two theories in alternative counts as part of its takings claim. Although the court should have stricken the *Loretto* count, it properly denied the state's motion to dismiss the regulatory taking count. As noted above, the trial court granted plaintiff summary judgment on its regulatory taking count and submitted the *Loretto* count to the jury. In response to a separate question, the jury also determined damages, but it is undisputed that the damages under either theory would be the same. Thus, although the submission of plaintiff's *Loretto*

theory to the jury was erroneous, the jury's damage award nevertheless was proper if the trial court correctly decided the regulatory taking question. This is not a situation where we cannot tell what theory the jury followed in reaching its conclusion. *Cf. Whinston v. Kaiser Foundation Hosp.*, 309 Or. 350, 357, 788 P.2d 428 (1990) (where more than one theory is submitted to the jury and some are unsupported by the evidence, but it cannot be determined on which allegation the jury based its verdict, a new trial must be granted). Only one theory of liability was before the jury here, and even though it was not properly before the jury, the damages question, which applied in the same manner to both takings theories, was properly before the jury and would have been properly before the jury even if the trial court had correctly stricken the *Loretto* count from plaintiff's takings claim. We therefore turn to the pleading issues pertaining to the regulatory taking claim.

The state argues that the trial court erred in striking its defense that Boise's proposed logging would constitute a nuisance and that the state cannot be liable for refusing to permit Boise to perform acts that constitute a nuisance and violate the law. In *Lucas*, the Court noted that there would be no taking if "the proscribed use interests were not part of [the property owner's] title to begin with." 505 U.S. at 1027, 112 S.Ct. 2886. The Court further noted that such limitations "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029, 112 S.Ct. 2886. The state's defense at issue here appears to rest on this part of the *Lucas* case.

The state offers no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance. The case on which it relies, *Columbia Fishermen's Union v. St. Helens*, 160 Or. 654, 87 P.2d 195 (1939), concerned a suit by fishermen to enjoin the city of St. Helens from dumping raw sewage into the Columbia River--a practice which, needless to say, was detrimental to the fish population on which the fishermen depended for their livelihoods. That case concluded that the fisherman had standing to maintain an action against the city. *Id.* at 666, 87 P.2d 195.

However, any analogy to the present case is less than clear. The court in *Columbia* indicated that the state could protect its navigable waters from pollution because it had an interest in *ferae naturae* (the fish) in the waters. It does not follow, as the state seems to posit, that any act taken by the state to protect *ferae* naturae on private property is the equivalent to an abatement of a public nuisance or, alternatively, any act by a private party to destroy *ferae naturae* on private property constitutes a public nuisance. *Cf. State Dept. of Env. Qual. v. Chem. Waste*, 19 Or.App. 712, 719, 528 P.2d 1076 (1974) ("defendant has been 'operating' the site in violation of the Environmentally Hazardous Wastes Statutes from the time they became effective in early 1972, [but] that continuing violation does not require a finding that the site constitutes a public nuisance"). The trial court correctly struck the state's defense that plaintiff's proposed logging constituted a public nuisance.

In its final assignment of error concerning the pleadings, the state argues that the trial court erred in striking its defense that it labeled as "failure to

exhaust its administrative remedies." The state argues that Boise's regulatory takings claim is unripe because it did not make an effort to obtain an "incidental take" permit pursuant to 16 USC section 1539(a). *Former* OAR 660-24-809(5) provided that "[e]xceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act." The state argues that, because plaintiff did not attempt to avail itself of this exception, it may not yet assert a takings claim. The trial court granted Boise's motion to strike this defense without stating its reason for doing so. We therefore examine all of the arguments made to the trial court on this issue in order to determine if the trial court erred in striking this defense.

As an initial matter, Boise correctly points out that the state's argument is not so much an exhaustion of remedies argument as it is a ripeness argument. However, the terminology used in the caption is not dispositive here, as the parties clearly addressed the issue in the lower court as a ripeness issue, and Boise does not contend that the state failed to preserve this issue. We do not consider a mislabeling of a caption in the pleadings to be dispositive where the body of the pleading adequately describes the nature of the defense that is being asserted. *See Curran v. ODOT*, 151 Or.App. 781, 786 n. 4, 951 P.2d 183 (1997) (concluding under similar circumstances that ripeness issue was preserved).

Both parties agree that the relevant concept is laid out in the Court's decision in *Williamson Planning* Comm'n *v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct.

3108, 87 L.Ed.2d 126 (1985).[7] In *Williamson*, the plaintiff sought to develop certain property based on the preliminary approval of a plat map that had been obtained by its predecessor in interest. The planning commission disapproved the development because it failed to comply with numerous zoning ordinances. *Id.* at 176-83, 105 S.Ct. 3108. Rather than applying for variances from the zoning ordinances, the plaintiff sought just compensation under the Fifth Amendment. The Court looked to its earlier cases, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), and *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), stating that

> "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. 3108.

The Court quoted from *Hodel*:

> "There is no indication in the record that appellees have availed themselves of the opportunities

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[7] In Williamson, the Court explained the distinction between "exhaustion of remedies" and "ripeness" as follows:

> "While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."

> provided by the Act to obtain administrative relief by requesting either a variance * * * or a waiver * * *[.] If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue * * * simply is not ripe for judicial resolution." 452 U.S. at 297, 101 S.Ct. 2352.

The *Williamson* Court went on to note that, in *Agins*, the property owners had submitted a plan that was disapproved but, as they had not sought approval of any other type of plan, it "was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." 473 U.S. at 187, 105 S.Ct. 3108. The *Williamson* Court concluded that the claim was unripe for the same reason that the claim in *Hodel* was unripe: had the plaintiff sought and obtained available variances and waivers, the parties might have reached a mutually acceptable solution. *Id.* at 188-90, 105 S.Ct. 3108; *cf. Curran v. ODOT*, 151 Or.App. at 787, 951 P.2d 183 (addressing ripeness problem under Article I, section 18, of the Oregon Constitution, the court concluded that plaintiff's failure to apply for a permit that could have obviated "takings" meant that plaintiff's claim was not ripe); *Larson v. Multnomah County*, 121 Or.App. 119, 122, 854 P.2d 476, *adhered to on recons.* 123 Or.App. 300, 859 P.2d 574 (1993) (recognizing rule that if a landowner has unsuccessfully filed an application but has pursued no alternatives that could lead to approval, a takings claim is unripe).

The state maintains that plaintiff's claim suffers the same flaw as did the claims of the plaintiffs in *Williamson* and *Hodel*. The state argues that plaintiff's failure to seek an "incidental take" permit from the United States Fish and Wildlife Service pursuant to 16 USC section 1539(a), which is a prerequisite to any variance under *former* OAR 660-24-809(5) for destruction of northern spotted owl habitat, creates a ripeness problem similar to the ripeness problems of the plaintiffs in *Williamson* and *Hodel* due to their failure to seek variances that could have obviated the problem.

Boise responds by making several points. First, it notes that it is undisputed that, even if Boise had obtained an incidental take permit from the United States Fish and Wildlife Service, the state would not have been obliged to approve Boise's logging plan. That is true; under *former* OAR 660- 24-809(5), an incidental take permit is a prerequisite to state approval of a logging plan that destroys spotted owl habitat, but an incidental take permit does not, in itself, guarantee that the logging plan will be approved. However, nothing in *Williamson*, *Hodel* or *Agins* implies that a waiver or variance must be a "sure thing" in order for a plaintiff to be required to pursue such a remedy before bringing a takings claim.

Boise also suggested, in the course of its arguments on this issue to the trial court, that no incidental take permit would have been required in any event, for several reasons. First, Boise asserted that the Endangered Species Act only prohibits "taking" an endangered species, and destroying an endangered species' habitat does not fall within the definition of "take":

> "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 USC Section 1532(19).
>
> We disagree with plaintiff's assertion that the definition of "take" does not encompass destruction of habitat. In *Babbitt v. Sweet Home Chapter, Etc.*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995), the Court upheld an Interior Department rule that defined "harm" as including destruction of endangered species' habitat. *See also Palila v. Hawaii Dept. of Land and Natural Resources* (*Palila II*), 852 F.2d 1106, 1108 (9th Cir.1988) (same).

Boise also suggested in the trial court that, because the United States Department of Fish and Wildlife had enacted a regulation defining critical habitat for the spotted owl on federal lands but not on private land, Boise somehow was exempted from any requirement that it acquire an "incidental take" permit before taking owls on its private property. Boise argued:

> "[T]he USF & WS had published in the Federal Register its own regulations governing the Northern Spotted Owl. 57 Fed Reg 1796-01 (Jan 15, 1992 WL4601 (F.R.)). In that document it defined the critical habitat for the bird's recovery. It made a specific finding that private lands were not included in critical habitat, even where the surrounding federal lands had been so designated. Clatsop County contains no federal critical habitat areas for the Northern Spotted Owl and even the more than 100,000 acres of State commercial timberlands in the county have not been so designated."

It is unsurprising that the regulation found at 57 Fed Reg 1796 (Jan 15, 1992) referred only to critical habitat on federal lands, given that the regulation pertains only to section 7 of the Endangered Species Act, which is a section that sets forth the obligations of federal agencies in protecting endangered species. The prohibition on "*any person*" taking an endangered species, by contrast, is contained in section 9 of the Act,[8] which has a broader application that Section 7. The "incidental take" provisions are cross-referenced in section 1538, which pertains to "any person." The "incidental take" provisions are not limited to federal agency protection of endangered species under section 7. The summary of the regulation itself stated: "This critical habitat designation provides *additional* protection requirements under section 7 of the Act with regard to activities that are funded, authorized, or carried out by a Federal agency." 57 Fed Reg 1796 (Jan 15, 1992) (emphasis added). We conclude that this regulation has no direct bearing on whether Boise was excused, as a matter of law, from seeking an incidental take permit under the Endangered Species Act as a prerequisite to the ripening of its takings claim against the state.[9]

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[8] 16 USC Section 1538(1) provides, in part:

"(a) Generally:

"(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to -

" * * * * * *

"(B) take any such species within the United States or the territorial sea of the United States[.]"

[9] It is possible that the designation of critical habitat on federal lands could, in fact, affect whether or how incidental take permits are granted for taking endangered species on private lands. That, however, has no

Finally, Boise has suggested that it may be inferred from one of its trial exhibits that the state as much as admitted that it would not have approved Boise's logging plan even if Boise had applied for an incidental take permit. We understand Boise's argument to be an invocation of the "futility" exception to the ripeness requirement. *See generally Larson*, 121 Or.App. at 122, 854 P.2d 476 (describing "futility" exception).

For two reasons, either of which is independently dispositive, we reject Boise's assertion of futility. First, the question before us is whether the trial court erred in striking the state's defense on the pleadings; that question cannot be answered by reference to a trial exhibit that might, as a factual matter, be determinative of whether the state *prevailed* on that defense. Second, assuming for the sake of argument that that were not the case, the trial exhibit to which Boise refers does not indicate that it would be futile for Boise to obtain an incidental take permit. Rather, it indicates that the state's decision would not depend solely on the issuance of such a permit and that a decision by the federal government that such a permit was not required would not satisfy the Oregon administrative rule. One of the state's trial exhibits, on the other hand, is a letter of advice to Boise from the Assistant Regional Director of the United States Department of the Interior Fish and Wildlife Service indicating that "an incidental take permit is required when otherwise lawful activities will incidentally take a threatened species" and suggesting that they should visit the proposed logging site, after which the agency

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bearing on whether the state's defense based on Boise's failure to even attempt to get an incidental take permit should have been stricken from the pleadings.

"should be better able to discuss the situation and advise you regarding [an] incidental take permit." Neither of these trial exhibits, alone or together, indicate that it would have been futile for Boise to pursue an incidental take permit. We conclude that none of Boise's arguments in support of its motion to strike the state's defense that the claim was not ripe are meritorious. The trial court erred in striking the state's defense.

Because of our disposition of this assignment of error, we need not reach the state's numerous assignments of error pertaining to the conduct of the trial.

Reversed and remanded.

APPENDIX J

Paula J. Brownhill, Circuit Judge
(503) 325-8555

Philip L. Nelson, District Judge
(503) 325-8536

CIRCUIT/DISTRICT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF CLATSOP
Clatsop County Courthouse
749 Commercial
PO Box 659
Astoria, OR 97103

October 16, 1997

Phillip D. Chadsey
Attorney at Law
Standard Insurance Center
900 S. W. Fifth Avenue, Suite 2300
Portland, Oregon 97204

William F. Clora[illegible]
Attorney at Law
Department of Justice
1162 Court Street NE
100 Justice Building
Salem, Oregon 97310-0506

Re: *Boise Cascade Corporation vs. State of Oregon*
Case No. 93-2018

Gentlemen:

I ruled on several motions at the September 22, 1997 hearing. Mr. Chadsey submitted an order reflecting those rulings on September 30, 1997. I signed it

today and directed the clerk to file the second amended complaint and answer.

There are two matters under advisement. I will deny defendant's supplemental Rule 21 motion to dismiss for failure to state a claim. I will allow plaintiff's motion for partial summary judgment on Count 3 of the amended complaint. Mr. Chadsey, please prepare an order that reflects these rulings.

Yours truly,

/s/ Paula Brownhill
Paula Brownhill

APPENDIX K

IN THE CIRCUIT COURT
FOR THE STATE OF OREGON
COUNTY OF CLATSOP

[Filed NOV. 21, 1997]

Case No. 93-2018

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

SPECIAL INTERROGATORY VERDICT

We, the Jury, find:

1. Was plaintiff Boise Cascade Corporation required to submit to a physical occupation of its property as a result of the Board of Forestry's order denying its written plan to log the subject property from January 15, 1993?

ANSWER: Yes X No __

Proceed to question 2.

2. On January 15, 1993, what was the fair market value of the timber that plaintiff was unable to log due to the Board of Forestry's order?

ANSWER: $2,279,233

Proceed to question 3.

3. October 17, 1997, what was the fair market value of the timber?

ANSWER: $1,615,425

DATED November 21, 1997.

/s/ Constance Bourquein
Presiding Juror

APPENDIX L

IN THE CIRCUIT COURT
FOR THE STATE OF OREGON
COUNTY OF CLATSOP

[Filed APR. 30, 1993]

Case No. 93-2018

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

JUDGMENT

Pursuant to the order of dismissal entered in this case on April ____, 1993 and incorporated herewith, it is ORDERED:

1. Judgment is hereby entered in favor of defendant.

2. Plaintiff's Supplemental Complaint is dismissed with prejudice.

3. Costs shall be determined subsequently pursuant to ORCP 68.

Dated this 30th day of April, 1993.

/s/ Thomas E. Edison
THOMAS E. EDISON
Circuit Court Judge

PRESENTED BY:

Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

APPENDIX M

COURT OF APPEALS OF OREGON,
CLATSOP COUNTY
886 P.2d 1033 (Or. App. 1999)

93-2018; CA A79626
Thomas E. Edison, Judge

BOISE CASCADE CORPORATION,
a Delaware corporation,
Appellant,

v.

BOARD OF FORESTRY,
Respondent.

Argued and Submitted July 15, 1994
Decided Dec. 7, 1994

Phillip D. Chadsey, Portland, argued the cause for appellant. With him on the briefs was Stoel Rives Boley Jones & Grey.

Virginia L. Linder, Sol. Gen., argued the cause for respondent. With her on the brief were Theodore R. Kulongoski, Atty. Gen. and John T. Bagg, Asst. Atty. Gen.

Before ROSSMAN, *P.J.*, and De MUNIZ and LEESON, *JJ.*

De MUNIZ, *Judge*.

Reversed and Remanded.

Plaintiff appeals from the judgment for defendant Board of Forestry ("board") in this inverse condemnation action arising out of the board's refusal to

permit logging operations on plaintiff's property in which a spotted owl nesting site is located. Plaintiff contends that the board's refusal gives rise to an uncompensated taking of its property in violation of the Fifth Amendment to the federal constitution and Article I, section 18, of the state constitution. The trial court granted the state's ORCP 21 motion to dismiss on the grounds that the court lacked subject matter jurisdiction, that the action was not ripe and that plaintiff's complaint[1] failed to state takings claims. We disagree with the trial court that the motion to dismiss was properly granted on any of those grounds, and we reverse and remand.

For purposes of reviewing the granting of a motion to dismiss for failure to state a claim under ORCP 21A(8), we take as true the allegations in the complaint, along with any facts that might be adduced to prove the allegations. *Doyle v. Oregon Bank*, 94 Or.App. 230, 232, 764 P.2d 1379 (1988), *rev. den.* 307 Or. 571, 771 P.2d 1021 (1989).[2] With two exceptions that we will discuss below, the state accepts the

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[1] We use the generic term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[2] Although the allegations in the complaint do not play the same definitive role with respect to the jurisdictional issue, *see* ORCP 21A(1), the facts concerning it are undisputed, and it is resolvable solely on legal grounds. Ripeness issues fall in a gray area, in that they are not jurisdictional, and they are *usually* presented as matters of defense. However, the ripeness contentions presented here turn in part on a purely legal question and in part on factual questions that cannot be conclusively answered on the basis of this record--whether inside the complaint or out. It is unnecessary for us to decide whether we may look beyond the complaint to resolve the state's ripeness arguments because, at this stage of the case, they fail whether or not we do.

statement of facts in plaintiff's opening brief as adequately summarizing the complaint. Accordingly, we take the facts that are material to our discussion from plaintiff's statement:

> "Boise Cascade has been the owner of real property in Clatsop County, consisting of approximately 65 acres of commercial timberland, which is known as the 'Walker Creek Unit' * * *. The Walker Creek Unit is the only commercial timberland that plaintiff owns in Clatsop County.

"In October 1988, Boise Cascade acquired the Walker Creek Unit. At that time and all times since, it has been zoned as commercial timberland. The Walker Creek Unit also cannot be developed or used for a commercial purpose that is not authorized by Land Conservation and Development Commission Goal 4 governing forestlands. OAR 660-06-000, et seq. That goal limits commercial activities on such lands to forest operations related to the growing and harvesting of any tree species as defined in ORS 527.620(6) and certain locationally dependent or compatible forest uses. Consistent with that goal, ORS 527.630(1) provides, in part, that 'it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land * * *.' At the time plaintiff acquired the subject property and at all times since, the Oregon Threatened or Endangered Wildlife Species Act, (ORS 496.192(1)), has provided, in part, that it was not intended 'to require an owner of any commercial forestland or other private land to take action to

protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land.'

"Plaintiff acquired the Walker Creek Unit with the reasonable economic expectation that it could log the existing merchantable timber on the property and replant it with forest tree species in order to provide future merchantable timber harvests from the unit. The existing merchantable timber on the Walker Creek Unit consists of old and second growth Douglas Fir, Western Red Cedar, and Western Hemlock.

"In August 1990, the Oregon State Forester adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area 'of the best available suitable habitat in the vicinity of the [nest] site.' Also in 1990, a pair of spotted owls were found nesting on a tree within the Walker Creek unit. Old growth timber of the kind found on the Walker Creek Unit is considered to be the best suitable habitat for spotted owls. The Board subsequently adopted OAR 629-24-809, which requires protection of a 70-acre core area of suitable habitat encompassing the nest site.

"Commercial timberland, consisting of trees that are 70 years or less in age, is not considered to be the 'best' suitable owl habitat if old growth timber is also available in the vicinity of the nest site. In addition to the pair in the Walker Creek Unit, a number of other pairs of spotted owls have been found in Clatsop County. Some of those nest on State of Oregon-owned timberland that does meet the habitat requirements of OAR 629-24-809. Spotted owls have been found in 50- to 60-year old timber in the Buster Creek drainage in Clatsop County. Several pairs of spotted owls have been found in the Jewell area,

which is approximately four air miles from the Walker Creek Unit. Spotted owls, including juveniles when they fledge, will often fly 20 miles or more in order to find new suitable habitat.

"On January 7, 1992, plaintiff filed Notification No. 92-521-11022 giving notice to the Oregon State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. Because of the location of protected waters on or near the Walker Creek Unit and the Walker Creek Unit's identification as spotted owl habitat, a written logging plan was required. Plaintiff filed such a plan on February 4, 1992. The plan provided that, if a pair of owls nested in the operations area in 1992, no operation would be conducted during the critical period of use, March 1 to September 30, or until the young owls had fledged, in order to avoid any incidental harm to the owls while they were present in the area. That plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

"On May 5, 1992, plaintiff submitted an amended written logging plan. The amended plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was a different site from the one that had been occupied by a pair of owls in 1990. The amended plan provided that plaintiff would not conduct operations in the area while the owls were present. With respect to the habitat identification requirement, the amended plan specifically provided that there were more than 70 acres of commercial timberland immediately adjacent to the Walker Creek

Unit that were owned by the State of Oregon and that could provide habitat for the owls after plaintiff's property had been logged. Except for the subject timber which plaintiff desires to log, there is not sufficient 'suitable spotted owl habitat,' as defined by OAR 629-24-809(1)(a), in the immediate area of the Walker Creek Unit to meet the requirements of that statute. Further, the only known nest trees in the immediate area of the Walker Creek Unit to meet the requirements of that area are located within the unit which plaintiff desires to log. On May 15, 1992, approval of the amended plan was denied. In denying plaintiff's amended plan, the Oregon Department of Forestry identified the core areas consisting of approximately 56 acres of plaintiff's unit, nine acres of another private landowner's timber, and approximately five acres of adjacent timberland owned by the State of Oregon. The Oregon Department of Forestry did advise plaintiff that there were eight acres in its Walker Creek Unit that could be harvested.

"Plaintiff then took a timely appeal of the Oregon Department of Forestry's denial of its amended plan to the Board. As a basis for that appeal, plaintiff claimed that the Board's requirement that plaintiff set aside any part of its merchantable timber, including the nest trees, for spotted owl habitat constituted a taking of such property for a public purpose which requires just compensation under Article I, section 18, to the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. After a contested case hearing was held, on January 6, 1993, the Board refused to waive the 70-acre nest site requirement in order to permit plaintiff to log its Walker Creek Unit, and on January 15, 1993, it entered a final order which

affirmed the denial of plaintiff's amended plan. The denial of plaintiff's written plan by the Board was a final administrative action prohibiting plaintiff from logging the subject timber.

"The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged. After logging and replanting, with young forest tree species as required by law, the land would have a fair market value of $500 per acre.

"Since 1987, when the northern spotted owl was designated as a 'threatened species' pursuant to ORS 496.172, et seq., the State of Oregon has continued to sell its own merchantable timber in Clatsop County for the purpose of having it logged in order to provide revenue to various governmental entities and to manage its commercial timberland for future timber production. The State of Oregon has sold stands of merchantable timber that it owns within 20 miles of plaintiff's Walker Creek Unit even after the Board refused to permit plaintiff to log its merchantable timber.

"After the amended plan was denied approval by the Board in January 1993, on February 22, 1993, plaintiff submitted a written plan No. 93-251-11132 to log four acres of its Walker Creek Unit that the Oregon Department of Forestry had previously agreed could be harvested. On March 8, 1993, the Oregon Department of Forestry approved that plan, subject to the condition that logging operations not

begin until October 1, 1993, and end by March 1, 1994, because of the close proximity of those four acres to the spotted owl nest sites in the adjacent core area.

"On March 19, 1993, plaintiff appealed to the Board the temporal condition placed on its right to log the four acres on the basis that the restriction constituted a temporary taking of the subject timber. After a hearing, the Board on April 19, 1993, issued its order refusing to remove the temporal condition which prevents plaintiff from commencing logging operations before October 1, 1993. The Board's action in refusing to remove the temporal condition was a final administrative action which prevents plaintiff from logging its timber in a timely manner.

"Boise Cascade is presently deprived of all economic use of its merchantable timber on the subject four acres."

The two aspects of plaintiff's factual recitation with which the state disagrees are, in the state's words, the allegations that "plaintiff is presently deprived of all economic use of its merchantable timber on land governed by the restriction in OAR 629-24-809," and that the "underlying commercial forestland has no separate economic value until the timber has been logged." The state argues that both allegations are conclusions of law, which should not be considered in determining whether the complaint states a claim. The state also argues that the second allegation is legally wrong, because the timber and the land are not separable property interests, and the land has value notwithstanding regulations on the logging of the timber.

The state is incorrect on both points. The state's argument concerning the separability of the timber and the land is adversely answered by *Hawkins v. City of La Grande*, 315 Or. 57, 70-71, 843 P.2d 400 (1992), and its efforts to distinguish that case do not persuade us. Moreover, for purposes of our review of the motion to dismiss, the point is close to academic: Plaintiff alleges that, if it cannot log the land, the land has no economically viable or beneficial use. In other words, plaintiff alleges that, at least as of now, it has lost all economic and beneficial use of the land, as well as of the timber, by virtue of the restrictions on logging.

The state's second point apparently is premised on the fact that loss of all economically viable or substantial beneficial use of property is the legal test for whether a regulatory taking can be found under the Fifth Amendment and Article I, section 18, respectively. *See Lucas v. South Carolina Coastal Council*, ____ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 581 P.2d 50 (1978). However, whether such a loss has occurred is also a factual question, and it is an ultimate question of fact in a regulatory takings case.

Plaintiff's pleading of that fact, coupled with the state's choice to proceed by a motion to dismiss, makes the disposition of this appeal turn on what is alleged in the complaint rather than on what the factual and legal merits of the parties' cases may ultimately prove to be. Many of the state's arguments in this appeal present matters that are outside the complaint. As noted, our review of a motion to dismiss for failure to state a claim starts with the premise that all well-pleaded allegations in the

complaint are true, and our review is confined to matters that appear in the complaint. ORCP 21A; *Emmert v. O'Brien*, 72 Or.App. 752, 754, 697 P.2d 222 (1985).

For that reason, at *this* stage of the present case, we are in much the same position that the reviewing courts were in *Lucas v. South Carolina Coastal Council, supra*. As the Oregon Supreme Court observed in *Dodd v. Hood River County*, 317 Or. 172, 183 n. 13, 855 P.2d 608 (1993), the state in *Lucas* "chose not to contest at any level the landowner's allegation that his land had been rendered absolutely worthless" by the regulation in question. Here, the state's motion to dismiss for failure to state a claim concedes plaintiff's corresponding allegation for purposes of the ruling on the motion and of our disposition of the present appeal. The difference between the cases is that, in *Lucas*, the state's failure to deny the contention *at any point* amounted to a confession of ultimate judgment, while in this case the presumption of the allegation's truth extends only to the proceedings on the preliminary motion that is now before us. With the foregoing as prologue, we turn to the parties' specific arguments.

In its first assignment, plaintiff contends that the court erred by ruling that it lacked subject matter jurisdiction. The apparent basis for the ruling, and the principal basis on which the state defends it in this appeal, was that the board's action was taken in the context of a contested case proceeding, and it is subject to exclusive review under applicable provi-

sions of the Administrative Procedures Act (APA). ORS 183.310 *et seq.*; *see* ORS 183.482.[3]

The remedy plaintiff seeks here is compensation for the taking that it contends the board's action has occasioned. If all of plaintiff's material allegations are found to be true, its right to that remedy does not depend on whether the board's orders are reversible on direct review. Stated another way, plaintiff does not seek review in this case of what the board *did* but seeks relief for the taking that it maintains the board action has *caused*. Accordingly, plaintiff contends that an inverse condemnation proceeding is not made unavailable on the ground that there is an exclusive APA remedy, because it is not seeking review of the correctness of the board's orders; rather, plaintiff is contending that, right or wrong, the orders impose a regulation that results in a taking. We agree with plaintiff on that aspect of its jurisdictional argument. This action is not part of the administrative process and is not subject to or restricted by the APA. However, the parties' other jurisdictional contentions require more extensive discussion.

Both parties rely on *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987). The Supreme Court held there that takings claims may be asserted in circuit court inverse condemnation actions, as well as

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[3] Plaintiff has sought APA review of the board's orders, and we have issued our decision on those petitions simultaneously with this decision. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 552, 886 P2d 1041 (1994). Some of the jurisdictional arguments we address here appear in the parties' briefs in that case rather than in their presentations in this appeal. However, because the issue is jurisdictional, we are free to consider factors the parties do not raise here, as well as those they do.

in appeals to the Land Use Board of Appeals (LUBA) from local land use decisions. Each party relies on language in *Dunn* that, read in its selected context, supports the party's position. The state takes the view that *Dunn* supports the proposition that an agency has "primary jurisdiction" to decide whether its regulation gives rise to a taking; only after the agency has made that determination does circuit court authority arise to decide actions that can culminate in monetary relief. According to the state, not until an agency has decided whether a taking would result from its regulatory action can it be appropriate for damages to be considered; up to that point, the agency has the right to change its regulatory decision and thereby avoid both the need for compensating a landowner and the circuit court proceeding that could result in that remedy. Hence, the state concludes that the circuit courts do not obtain jurisdiction before the agency has decided initially whether a regulatory taking has resulted from its regulatory action.

In *Springer v. City of Bend*, 111 Or.App. 136, 826 P.2d 1, *rev. den.* 313 Or. 354, 833 P.2d 1283 (1992), and *Nelson v. City of Lake Oswego*, 126 Or.App. 416, 869 P.2d 350 (1994), we addressed the effect of *Dunn* on circuit court jurisdiction and authority over inverse condemnation claims. We said in *Springer* that the Supreme Court had concluded in *Dunn*:

> "[A]lthough damages for inverse condemnation could only be recovered in a judicial action, 'regulatory takings' issues could arise as constitutional questions and be relevant in LUBA's disposition of appeals from local land use decisions. The court concluded that inverse condemnation issues could be asserted in both forums.

"Circuit courts have always had jurisdiction—exclusive *or* concurrent—to try inverse condemnation claims; neither [the Supreme Court's nor this court's] opinion in *Dunn* did anything to change that, and both in fact reiterated it." 111 Or.App. at 138-39, 826 P.2d 1. (Emphasis in original; footnote omitted.)

However, we also noted in *Springer*:

> "The Supreme Court suggested that there might be circumstances in which a circuit court must delay a decision on an inverse condemnation claim until LUBA has decided a corresponding issue that is pending before it." 111 Or.App. at 139 n. 1, 826 P.2d 1.

If the question here was whether LUBA or the circuit court had initial *authority* to decide the question, we might agree with the distinction that the state draws as it applies to that agency's initial authority and the circuit court's.[4] For a number of

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[4] The court in *Dunn* summarized its holding:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in [the] circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision. The special provision for taking evidence beyond the record made before the local government, ORS 197.830(1), as was done here, shows that a full LUBA review of whatever may bear on the constitutionality of a land use decision was not

reasons, however, we cannot agree with the state's argument that, under *Dunn* or our cases, the circuit court lacked *jurisdiction* over this action. First, both *Dunn* and *Springer* make clear that the circuit courts *retain* their historical jurisdiction over inverse condemnation claims. *Dunn* does not purport to change that but, rather, holds that the statutes governing LUBA review *add* a form of concurrent LUBA jurisdiction; *Dunn* also holds that issues relating to the sequence of LUBA's and the courts' authority to act will arise in some contexts. However, neither of those holdings divests the circuit court of subject matter jurisdiction over inverse condemnation actions. They simply address the allocation or timing of authority between bodies that share jurisdiction.

The other reasons for our conclusion stem from the fact that the issue in this case does not involve LUBA's authority to decide takings questions; instead, the state asserts that agencies other than LUBA, whose regulations purportedly give rise to takings, have initial jurisdiction of the kind defined in *Dunn* to decide whether their own actions have occasioned takings. However, the court in *Dunn* did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies; rather, the *Dunn* decision was based very specifically on the statutes that confer jurisdiction on LUBA to review land use decisions and constitutional questions that arise in connection with them. *See* ORS 197.835(7)(a)(E). On the basis of that statutory analysis, the court concluded that the legislature has conferred jurisdiction on LUBA to

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beyond legislative contemplation." 303 Or. at 209, 735 P.2d 609.

share part of the circuit courts' historical decisional authority over takings questions.

The state attempts by analogy to equate LUBA's role and the board's under the *Dunn* rationale. The analogy does not succeed because, *inter alia*, LUBA is an adjudicative agency, while the board is the regulatory agency whose action is subject to adjudication to determine if it has resulted in a taking. The proper analogy is not between the board and LUBA, but between the board and a governmental body, as described in *Dunn*, that chooses to "[defend] the validity of its regulatory decision" before LUBA or the courts. 303 Or. at 209, 735 P.2d 609.

Whether it is performed by LUBA or the courts, the determination of whether a regulatory action results in a taking of private property is an adjudicative act. Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be dependent on a showing of facts that cannot even be known at the time that the regulatory decision is made, *e.g.*, the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the exclusion of the circuit courts, to

decide whether their own consummated regulatory actions have resulted in takings.[5]

We reject the state's jurisdictional argument, and we conclude that the trial court erred by ruling that it lacked jurisdiction. We turn to the ripeness issue. It is unclear whether the state's contention that the APA provides plaintiff's exclusive remedy is meant to relate solely to jurisdiction, or is also meant to suggest that the action is not ripe, because plaintiff did not exhaust available appeals from the board's orders to reviewing bodies before bringing this action. If the latter point is intended, we rejected a materially similar contention in *Nelson v. City of Lake Oswego, supra*, and we reject the present variation of it as well. The state's other ripeness arguments depend on facts that cannot be determined from the complaint or the record before us. *See* n. 2, *supra*. We hold that it was error to dismiss the action on ripeness grounds.

The remaining question is whether the trial court was correct in ruling that plaintiff's complaint fails to state a claim. The state makes a number of arguments that are directed against specific allegations and theories that plaintiff pleads. However, the state also makes one argument attacking the sufficiency of plaintiff's complaint as a whole. It contends that

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[5] We need not decide here whether the board has *any decisional* authority over such questions. The issue is whether the circuit court has jurisdiction. *See also Boise Cascade Corp. v. Board of Forestry, supra*, 131 Or.App. at 555 n. 1, 886 P.2d at 1043 n. 1.

We note that there was no "land use decision" or other event here that could have been appealed to LUBA. The board is the only agency that was or could have been involved in the relevant final decisions.

plaintiff did not and cannot plead that the alleged taking was an act by "a state agency authorized to exercise the power of eminent domain." According to the state, the board has no authority to condemn property. The state argues that that is an essential element of an inverse condemnation claim under *Tomasek v. State*, 196 Or. 120, 147, 248 P.2d 703 (1952), and later cases that follow it. However, the state reads *Tomasek* too literally; on the page of its opinion following the language on which the state relies, the court rejected as an "erroneous premise" the defendant's contention "that a distinction is to be drawn between the state itself and its agencies." 196 Or at 148, 248 P.2d 703.

More fundamentally, unlike the present case, *Tomasek* did not involve an alleged *regulatory* taking. Assuming that the state correctly reads *Tomasek* in its own context, the principle the state derives from it has no logical application in the regulatory takings context. It would be nonsensical to hold that there can be no regulatory taking claim if the regulatory agency whose action allegedly causes the taking happens not to have the power to condemn as well as the power to regulate. Even assuming that the Fifth Amendment would permit the state to make inverse condemnation proceedings unavailable for regulatory taking claims that are unrelated to the potential exercise of the eminent domain power, *Dunn v. City of Redmond, supra*, and *Springer v. City of Bend, supra*, make it clear that such proceedings are available for that purpose in this state.

Although plaintiff pleads a variety of *theories*, it has attempted to state only two *claims*: that there has been a taking of the "core" area of its property and that there has been a temporary taking of the

four-acre tract that was subject to the board's "temporal" restriction on logging. In both contexts, plaintiff alleges, in essence, that the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under both constitutions as to the principal part of the property, *see Lucas v. South Carolina Coastal Council, supra*; *Fifth Avenue Corp. v. Washington Co., supra*, and a temporary taking of the four-acre part. *See First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Because the motion to dismiss was directed against and allowed as to the entire complaint, it is unnecessary for us to decide whether any or all of plaintiff's alternative taking theories may prove to be factually or legally tenable. We nevertheless note that, even assuming the correctness of plaintiff's legal premises, the presence or absence of the requisite facts to support plaintiff's permanent physical occupation and its reasonable investment-backed expectations theories cannot be determined without further evidentiary development.

The parties' remaining arguments either require no further separate discussion or relate to matters that are beyond the reviewable record.

Reversed and remanded.

APPENDIX N

SUPREME COURT OF OREGON

CC 93-2018; CA A79626; SC S42159.

BOISE CASCADE CORPORATION,
a Delaware corporation,
Respondent on Review,

v.

BOARD OF FORESTRY,
Petitioner on Review.

Argued and Submitted Jan. 10, 1996
Decided April 10, 1997

Virginia L. Linder, Solicitor General, Salem, argued the cause for petitioner on review. With her on the brief were Theodore R. Kulongoski, Attorney General, and John T. Bagg, Assistant Attorney General.

Philip D. Chadsey, of Stoel Rives Boley Jones & Grey, Portland, argued the cause for respondent on review. With him on the briefs was Charles F. Adams.

Before CARSON, *C.J.*, and GILLETTE, VAN HOOMISSEN, FADELEY and DURHAM, *JJ.*[*]

On review from the Oregon Court of Appeals.

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[*] Unis, J., retired June 30, 1996, and did not participate in this decision; Graber, J., did not participate in the consideration or decision of this case.

GILLETTE, *Justice.*

This is an inverse condemnation case in which plaintiff Boise Cascade asserts that the defendant State of Oregon, acting through its Board of Forestry, has "taken" certain property of Boise Cascade by promulgating a rule that, Boise Cascade alleges, denies Boise Cascade all beneficial use of the property.[1] The state seeks review of a decision of the Court of Appeals, which reversed a circuit court order that dismissed plaintiff's inverse condemnation action under ORCP 21[2] on several grounds. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033 (1994) ("*Boise I*").[3] There are two

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[1] "Inverse condemnation" refers to a claim "against a governmental agency to recover the value of property taken by the agency although no formal exercise of the power of eminent domain has been completed by the taking agency." *Lincoln Loan v. State Hwy. Comm.*, 274 Or. 49, 51 n. 1, 545 P.2d 105 (1976) (citing *Thornburg v. Port of Portland*, 233 Or. 178, 180, 376 P.2d 100 (1963)).

"'Eminent domain' is the power inherent in a sovereign state of taking or of authorizing the taking of any property within its jurisdiction for a public use or benefit." *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 466, 900 P.2d 495 (1995) (citing *Dept. of Trans. v. Lundberg*, 312 Or. 568, 571 n. 1, 825 P.2d 641 (1992)).

[2] ORCP 21 A(8) provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (8) failure to state ultimate facts sufficient to constitute a claim[.]"

[3] Boise I was consolidated for purposes of oral argument in this court with our review of *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 552, 886 P.2d 1041 (1994) ("*Boise II*"). *Boise II* involves two petitions for judicial review of two final

issues before us: (1) whether, in an inverse condemnation proceeding of this kind, a court should (or must) stay its own proceeding until the agency first has an opportunity to determine whether the application of its rule effected a "taking" and, if not, (2) whether plaintiff has stated a claim in this case. We conclude that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in this case. We also conclude that certain of the allegations in plaintiff's complaint are sufficient to survive a motion to dismiss.

FACTS

In February 1992, plaintiff filed a proposal with the Oregon Department of Forestry ("the Department") to log a 64-acre parcel of plaintiff's land (the "Walker Creek Unit").[4]

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orders of the Board of Forestry. The first final order, dated January 15, 1993, denied plaintiff's plan to log the same 64-acre property owned by plaintiff that is the subject of the present case. The second final order, dated April 19, 1993, approved plaintiff's plan to log four acres within the larger parcel, subject to a temporal restriction that no logging occur during spotted owl nesting season. Plaintiff sought judicial review of both final orders in the Court of Appeals. The Court of Appeals consolidated the two administrative petitions (*Boise II*), but did not consolidate the circuit court appeal (*Boise I*) with *Boise II*.

[4] The Oregon Blue Book adequately describes the relationship between the Board of Forestry, State Department of Forestry, and the State Forester as follows:

> "The seven-member board [of forestry], appointed by the governor, makes policy and provides vision to the overall management and protection of the state's 11 million acres of state-owned and private forest land. It operates under ORS chapter 526 in setting forest policy for the state. The board authorizes a forestry program for Oregon designed to

The land contains northern spotted owl nests and is subject to the northern spotted owl protection provisions of OAR 629-24-809, which the Board of Forestry ("the Board") adopted in 1990.[5] The Department denied the proposal on the ground that the logging plan did not provide sufficient protection for spotted owl habitat, as required by OAR 629-24-809.

In May 1992, plaintiff submitted an amended logging plan. The Department again denied the proposal,

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assure an adequate future wood supply to benefit society, the economy and the environment.

"The Department of Forestry, authorized by ORS 526.008 and established in 1911, is under the direction of the state forester, who is appointed by the Board of Forestry. The statutes direct the state forester to act on all matters pertaining to forestry, the protection of forest lands and the conservation of forest resources."

Claire Levine, ed., *1995-96 Oregon Blue Book*, 67 (1995).

[5] OAR 629-24-809 provides, in part:

"(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

"(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

"(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site, such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year."

pursuant to OAR 629-24-809, but advised plaintiff that eight specified acres of the Walker Creek Unit could be logged, if the logging did not take place either between March 1 and September 30, 1992 (which was the critical period of use), or until young spotted owls fledged. Plaintiff appealed that decision to the Board arguing, inter alia, that such an application of OAR 629-24-809 to its Walker Creek Unit property effected a "taking" of that property under the state and federal constitutions.

On January 15, 1993, the Board rejected plaintiff's challenge and entered a final order denying plaintiff's logging plan for the 64 acres. With respect to plaintiff's "takings" argument, the Board stated:

> "Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts * * * that such an argument is not premature, it did not at hearing attempt to present evidence that any 'taking' had in fact occurred. * * * Certainly[,] there is an inadequate factual basis upon which to advance any claim of a constitutional taking."

On February 1, 1993, plaintiff filed this inverse condemnation action in Clatsop County Circuit Court, alleging that the Board's application of its administrative rule constituted a "taking" under Article I, section 18, of the Oregon Constitution, and under the Fifth Amendment to the United States Constitution.[6] (*Boise I*).

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[6] Article I, section 18, of the Oregon Constitution, provides:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered[.]"

On February 22, 1993, after it had filed the present action, plaintiff submitted a plan to log four of the eight acres that the Department previously had agreed could be harvested. On March 8, 1993, the Department approved plaintiff's plan, subject to a condition that the logging not begin until October 1, 1993, and end by March 1, 1994, when no nesting would take place. Plaintiff appealed that temporal restriction to the Board and argued, *inter alia*, that the temporal restriction also constituted a temporary "taking" under the state and federal constitutions.

On March 17, 1993, while its second "takings" claim concerning the four-acre parcel still was pending before the Board, plaintiff petitioned the Court of Appeals for judicial review of the Board's January 15, 1993, order. (*Boise II*).

On April 19, 1993, the Board rejected plaintiff's challenge to the temporal restriction concerning the four acres and entered a second final order. In that order, the Board *did not address* the "takings" issue. Rather, the Board stated that "[t]he issue of whether there is a taking would more properly be [addressed] in a court of competent jurisdiction, once administrative remedies are exhausted."

The Fifth Amendment to the United States Constitution, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Takings Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

On April 22, 1993, plaintiff filed a supplemental complaint in the present circuit court action, alleging that the separate temporal restriction on logging the four acres constituted a separate "taking." (*Boise I*).

On April 26, 1993, plaintiff filed a second petition for judicial review, seeking review of the Board's April 19, 1993, order that refused to remove the temporal condition on logging of the four acres. As noted, the Court of Appeals consolidated that proceeding with the earlier administrative review proceeding. (*Boise II*).

In May 1993, the circuit court granted the state's motion to dismiss the entire inverse condemnation claim on the grounds that the court lacked subject matter jurisdiction over the dispute, that the action was not ripe, and that the complaint failed to state a claim. (*Boise I*). Plaintiff appealed the circuit court's ruling to the Court of Appeals, which reversed the dismissal of plaintiff's inverse condemnation claim on all three grounds. The state petitioned for review.[7]

DISCUSSION

I. *Jurisdiction*

The first issue presented is whether, as the state argues, in a regulatory "takings" claim, the agency that promulgated the rule that is alleged to effect a "taking" has primary jurisdiction to determine whether the application of that rule does, in fact, constitute a "taking."[8] The Court of Appeals held

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[7] We reject the state's ripeness arguments for the reasons stated in the Court of Appeals' opinion. *Boise I*, 131 Or.App. at 540 n. 2, 886 P.2d 1033.

[8] The doctrine of "primary" jurisdiction is defined as a doctrine under which, "where the law vests in an administrative

that the Board and the circuit court have *concurrent* jurisdiction over plaintiff's "takings" claims, but declined to decide whether the Board has any "decisional authority" initially to decide the "takings" issue. *Boise I*, 131 Or.App. at 546-49, 886 P.2d 1033. The state advances two arguments on review: (1) The Board has "exclusive" jurisdiction, to the exclusion of the circuit court, to decide the "takings" issue; or, (2) alternatively, a regulatory "takings" claim must be resolved, in the first instance, by the agency whose rule is alleged to have effected a "taking," because the agency has "primary jurisdiction" over such claims.

There are two types of "primary" jurisdiction. First, *statutory* primary jurisdiction exists when a statute "specifically requires courts to apply the primary jurisdiction doctrine to a class of disputes." Kenneth Culp Davis and Richard J. Pierce, Jr., II, *Administrative Law Treatise* § 14.1, 276 (3d ed. 1994) (hereafter "Davis and Pierce").[9] Second, by contrast,

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agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Black's Law Dictionary* 1190-91 (6th ed. 1990). An even clearer and more comprehensive definition appears in a standard layman's dictionary: "[T]he right or responsibility of an administrative or regulatory agency to pass initially on controversies involving matters of fact or discretion within its sphere before relief is sought in the courts[.]" *Webster's Third New Int'l Dictionary* 1800 (unabridged ed. 1993). "Exclusive" jurisdiction is defined as jurisdiction "to the exclusion of all other [tribunals]." *Black's*, at 564. "Concurrent" jurisdiction means, in this case, that a court and administrative agency share "[a]uthority * * * to deal with the same subject matter." *Id.* at 291.

[9] For example, Professor Davis notes that "Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., provid[es] for nonjudicial and nonadversary resolution of claims and pro-

"[i]n the bulk of cases * * *, primary jurisdiction is a judge-made doctrine. Its scope and effect are determined by judicial reasoning." *Ibid.* There is no statute that addresses the issue before us; the state in this case is asserting the latter type of primary jurisdiction.

Judicial invocation of the doctrine of primary jurisdiction generally is appropriate when a court decides that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute that fall within that agency's statutory authority. The purpose behind the doctrine is the "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." Kenneth Culp Davis, *Administrative Law Text* § 19.01, 374 (3d ed.1972). The reason for the doctrine is "not a belief that an agency's expertise makes it superior to a court; [but] that a court confronted with problems within an agency's areas of specialization should have the advantage of whatever contributions the agency can make to the solutions." *Id.*, § 19.06 at 381. That is, the doctrine is one ordinarily invoked by a court in the traditional judicial system with the belief that a previous agency disposition of one or more issues before the court will assist the court in resolving the case before it.

Courts vary in their approaches to invoking the doctrine of primary jurisdiction. According to one treatise on administrative law, with which we agree:

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vid[es] that a complainant in a state or locality with a fair employment commission must first go to that commission with his claim." Davis and Pierce, § 14.1 at 276.

> "There is no fixed formula for determining whether an agency has primary jurisdiction over a dispute or an issue raised in a dispute. In making such determinations, courts consider several factors, including (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities."

Davis and Pierce, § 14.1 at 272. The authors also observe, however, that, "[i]ncreasingly, * * * courts balance the considerations that favor allocation of initial decisionmaking responsibility to an agency against the likelihood that application of primary jurisdiction will unduly delay resolution of the dispute before the court." *Ibid.*

Upon invoking the doctrine of primary jurisdiction, the disposition of the case depends on the nature of the parties' dispute and the scope of the agency's authority. If an agency has primary jurisdiction over the entire dispute, the court action is dismissed. However, if an agency has primary jurisdiction over an issue in dispute,

> "the court will defer any decision in the action before it until the agency has addressed the issue that is within its primary jurisdiction. The court retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it cannot resolve that dispute until the agency has resolved the issue that is in its primary jurisdiction."

Davis and Pierce, § 14.1 at 271.

We now turn to the present case. The state argued in the Court of Appeals that the Board has primary jurisdiction over the "takings" claim under *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987).[10] The Court of Appeals rejected that argument for two reasons. First, the court concluded that Dunn did not hold that circuit courts lack jurisdiction over inverse condemnation claims. Rather, that case concerned the sequence of the Land Use Board of Appeals ("LUBA") and the circuit court's authority to act in some contexts, where both land use and "takings" issues were asserted and intertwined. *Boise I*, 131 Or.App. at 548, 886 P.2d 1033. Second, the Court of Appeals observed that Dunn dealt with LUBA's authority to decide "takings" questions and "did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies." *Ibid.*

The Court of Appeals also observed that LUBA is an adjudicative agency, while the Board is a regulatory agency, and that "the determination of whether a regulatory action results in a taking of private property is an adjudicative act." *Id.* at 549, 886 P.2d 1033. The court stated:

> "Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be de-

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[10] The facts and procedural history of Dunn are discussed below, 325 Or. at 195, 935 P.2d at 418.

> pendent on a showing of facts that cannot even be known at the time that the regulatory decision is made, e.g., the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the exclusion of the circuit courts, to decide whether their own consummated regulatory actions have resulted in takings."

Ibid. (footnote omitted).

On review, the state challenges what it describes as the Court of Appeals' "overly narrow" application of *Dunn*. The state concedes that Dunn arose in a different context from this case, but argues that the rationale underlying *Dunn* supports the conclusion that the agency has *primary jurisdiction* to resolve a regulatory "takings" claim in this case.[11] In the state's view, *Dunn* "stands for the proposition that the forum jurisdiction issue requires an examination, first and foremost, of the statutory scheme that the legislature has put into place" and for the proposition that "the legislature may place jurisdiction over takings claims in an administrative venue, and that legislative choice will be respected by the courts."

The state observes that the Board, like other administrative agencies, has authority to consider a complaint that includes constitutional claims. From

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[11] In the alternative, the state argues that the Court of Appeals should have concluded "that the board has primary, *if not exclusive*, jurisdiction over the takings challenge." (Emphasis added.)

that fact, the state reasons that the Board has authority to resolve a "takings" claim. According to the state, "[t]he fact that the board has the authority to adjudicate constitutional challenges to its own rule, and that under the APA [Oregon Administrative Procedures Act (ORS chapter 183)] its decisions are subject to full judicial review, should have led the Court of Appeals to conclude that the board has primary, if not exclusive, jurisdiction over the takings challenge." The state also argues, *inter alia*, that an inverse condemnation action in circuit court is duplicative and unnecessary, because administrative proceedings and judicial review of those proceedings adequately protect the constitutional interests at stake.

At the outset, we note that the state's reliance on Dunn is misplaced. In *Dunn*, a petitioner sought judicial review of LUBA's determination that two city ordinances did not constitute a "taking" of petitioner's land. The landowner argued that the ordinances allowed the city to "take" property, in violation of the state and federal constitutions. The Court of Appeals did not reach the merits of that claim, because it decided *sua sponte* that the challenged actions were beyond LUBA's jurisdiction and ordered LUBA to dismiss the proceeding. *Dunn v. City of Redmond*, 82 Or.App. 36, 727 P.2d 145 (1986).

On review, this court noted that "Oregon land use law assigns * * * LUBA 'exclusive jurisdiction' to review a 'land use decision,' including review of its constitutionality. ORS 197.825, 197.835(8)(a)(E)." *Dunn*, 303 Or. at 203, 735 P.2d 609. The court also noted that, under the applicable statutes, LUBA could "reverse or remand" an unconstitutional land

use decision. On the other hand, LUBA could not "award compensation when the constitutional claim is that the challenged decision takes private property for public use without just compensation." *Id.* at 204, 735 P.2d 609. The court stated:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the [circuit] court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision."

Id. at 209, 735 P.2d 609. *Dunn* rejected the Court of Appeals' conclusion that "LUBA loses jurisdiction whenever 'a taking claim is asserted,' even if the petition asserts that claim in an effort to invalidate a land use decision rather than to obtain compensation." *Id.* at 208, 735 P.2d 609.

In contrast to *Dunn*, this case does not involve a legislative grant of "exclusive jurisdiction" to an agency such as LUBA to consider plaintiff's claim. Rather, this case involves a circuit court challenge to final orders that the Board had the authority to enter. The alleged *effect* of the final orders was to preclude plaintiff from using its land. In our view, *Dunn* makes it clear that the fact that plaintiff's inverse condemnation claim *stems from* an agency

order does not preclude the circuit court from exercising jurisdiction. The issue presented—whether a "taking" occurred—is a constitutional question, and the context within which it is raised, an inverse condemnation action, traditionally falls within an area adjudicated by courts. Therefore, the traditional rationales for primary jurisdiction, such as agency expertise, collateral estoppel, and efficiency either are not applicable or are present only to a diminished degree.

Moreover, in this case, "the special competence of an administrative body" is not required to determine whether the application of OAR 629-24-809 effected a "taking" of plaintiff's land. *Cf.* Kenneth Culp Davis, *Administrative Law* 121 (6th ed.1977) ("a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer"). Likewise, other justifications for invoking the doctrine of primary jurisdiction, such as a need for uniform resolution of the legal issue involved or a consideration whether judicial resolution of the issue may adversely impact the agency's performance of its regulatory responsibilities, are not present in this context. Accordingly, it is not appropriate in this case to prevent the circuit court from exercising its jurisdiction over plaintiff's "takings" claim by invoking the doctrine of primary jurisdiction. That being so, we hold that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in this case. It follows that the trial court erred in dismissing the action for lack of subject matter jurisdiction.

II. *"Takings" by inverse condemnation under the Oregon Constitution*

Because this case comes to us on appeal of a judgment of dismissal, we next must determine whether plaintiff's complaint states a claim for relief.[12] For purposes of reviewing a motion to dismiss, we assume the truth of all well-pleaded facts alleged in the complaint and give plaintiff the benefit of all favorable inferences that may be drawn from those facts. *Stringer v. Car Data Systems, Inc.*, 314 Or. 576, 584, 841 P.2d 1183 (1992); *Oksenholt v. Lederle Laboratories*, 294 Or. 213, 215, 656 P.2d 293 (1982). In order to determine whether the complaint states a claim for relief, we first must discern what is required to establish a "takings" claim under Oregon law.[13]

Our decisional law demonstrates that there are at least two different ways in which governmental action may result in a "taking" by inverse condemnation under Article I, section 18, of the Oregon Constitution. The first arises when a present governmental action creates an expectation that the private land in question eventually will be taken for a public use. *See Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 613, 581 P.2d 50 (1978) (illustrating concept). In such circumstances, a property owner must prove that the owner is precluded from "all economically feasible private uses [of the property]

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[12] We use the term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[13] This court considers state constitutional claims before considering federal constitutional claims. *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983); *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981).

pending eventual taking for public use" or that "the designation [of the property for eventual public use] results in such governmental intrusion as to inflict virtually irreversible damage." *Id.* at 613-14, 581 P.2d 50.

The second category of "takings" by inverse condemnation occurs when the government acts to "intervene[ ] to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others." *Fifth Avenue Corp.*, 282 Or. at 613, 581 P.2d 50 (quoting *Fred F. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, 384-86 (citing Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62-63 (1964)), *cert. den.* 429 U.S. 990, 97 S.Ct. 515, 50 L.Ed.2d 602 (1976)). To establish a "taking" in the latter context, the test is essentially the same as under the former: The property owner must show that the application of the government's particular choice deprives the owner of *all economically viable use of the property*. *Fifth Avenue Corp.*, 282 Or. at 609, 613, 581 P.2d 50. If the owner has "some substantial beneficial use" of the property remaining, then the owner fails to meet the test. *Dodd v. Hood River County*, 317 Or. 172, 184-86, 855 P.2d 608 (1993).

In this case, plaintiff has alleged in both its claims for relief that the Board's application of OAR 629-24-809 to its proposed logging plans denied plaintiff all economic use of its land.[14] With respect to the first

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[14] Plaintiff's complaint outlines the lengthy procedural facts set forth above, which we will not repeat. The complaint also alleges, in part:

> "Plaintiff asserts two claims for inverse condemnation based on the Oregon and U.S. Constitutions. The first

claim for relief, the plaintiff has alleged "depriv[ation] * * * of the only economically viable use of approximately 56 acres of merchantable timber." Assuming the truth of all well-pleaded facts alleged in the complaint and giving plaintiff the benefit of all favorable inferences that may be drawn from those facts, that allegation is sufficient to meet the "deprivation of all economically viable use of the property" standard. The Court of Appeals was correct in so holding.

With respect to the second claim for relief, plaintiff has alleged two things: (1) The "*temporal* restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, * * * constitutes a *temporary* taking of plaintiff's timber for a public use," and (2) "[p]laintiff is *presently* deprived of all

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claim seeks just compensation for this regulatory taking, *which deprives plaintiff of the only economically viable use of approximately 56 acres of the merchantable timber*. The second claim involves a *temporal restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, which constitutes a temporary taking of plaintiff's timber for a public use.*"

"FIRST CLAIM FOR RELIEF

"*The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged.*"

"SECOND CLAIM FOR RELIEF

"*Plaintiff is presently deprived of all economic use of its merchantable timber on the subject four acres.*" (Emphasis added.)

economic use of its merchantable timber on the subject four acres." (Emphasis added.) In other words, plaintiff alleges a *temporary* deprivation of all economically viable use of the four acres *during the six-month period* when the temporal restriction was in effect.

Both this court and the United States Supreme Court have recognized that, under certain circumstances, a "temporary" taking of all economic use of a piece of property may constitute a "taking" under the pertinent provisions of the state and federal constitutions. *See Suess Builders v. City of Beaverton*, 294 Or. 254, 263, 656 P.2d 306 (1982) (decided at least in part under Article I, section 18, of the Oregon Constitution; holding that complaint, liberally construed, could be deemed to allege that one or more local governments had "temporarily taken all economic use of the plaintiffs' property"); *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2387, 96 L.Ed.2d 250 (1987) (holding to similar effect under Fifth and Fourteenth Amendments to the United States Constitution). But each of those cases was one in which a government regulation or ordinance that was on its face permanent in character allegedly prevented the owners from making *any* economic use of the property in question. By contrast, the allegations here affirmatively establish that, under the regulations, plaintiff *can* utilize the four acres in question for timber production during part of each calendar year. That is, the regulations appear to be permanent, but their interference with plaintiff's use of its property is not temporally comprehensive.

We think that, in order to distinguish between a "taking," on the one hand, and simple administrative

inconvenience or delay, on the other, it is necessary to require that a complaining party allege some degree of permanence in its loss. We hold that, in order to assert a claim for a "temporary taking" under the Oregon Constitution, the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its face or so long lived as to make any present economic plans for the property impractical. *See Suess Builders*, 294 Or. at 262-63, 656 P.2d 306 (to that effect). Under such a standard, plaintiff's complaint falls short. It alleges only that, during certain months of each year, it will not be permitted to harvest trees on the parcel. By necessary implication, there is nothing in the regulations that would prohibit harvesting during the balance of the year. To be a "taking," governmental action must be made of sterner stuff.

We understand the federal rule, under *First Lutheran*, to be to the same effect. 482 U.S. at 318, 107 S.Ct. at 2387. The Court of Appeals erred in holding that plaintiff had alleged a sufficient claim in its second claim for relief.

The state attempts to avoid the entire "takings" question by relying on *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 900 P.2d 495 (1995). The state argues that *GTE* stands for the proposition that express eminent domain authority is the predicate to a compensable "taking." In *GTE*, plaintiff GTE (a telephone local exchange carrier, "LEC") sought review of certain collocation rules adopted by

the Public Utility Commission ("PUC").[15] Under the challenged rule, an LEC was required to allow an enhanced services provider ("ESP") to occupy a portion of the LEC's property, for the purpose of placing the ESP's equipment there.

GTE argued that the PUC lacked the statutory authority to promulgate the collocation rules, because the rules allegedly constituted a "taking," in violation of the state and federal constitutions. GTE further argued that, because the PUC lacked the express eminent domain authority that is required before an agency may effect a "taking," the collocation rules are beyond the PUC's statutory authority, no matter how much compensation might be paid for actions taken under them. In other words, GTE argued that the PUC lacked authority to engage in acts, including rulemaking, that effect a "taking," because the PUC lacked *express* eminent domain authority to take property for a public purpose.

This court in *GTE* outlined relevant decisional law and stated:

> "The cases cited above establish a bright-line rule: that an agency may not act in eminent domain without an express grant of power from the legislature. It is up to the legislature, not the PUC or any other administrative agency, to determine how those powers should be exercised.

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[15] "'Collocation' means a service, offered by a[n] LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer." *GTE*, 321 Or. at 462, 900 P.2d 495.

> The legislature's reasons for granting or refusing to grant [to] an administrative agency the power to act in eminent domain may include a desire to refrain from depleting the public fisc. However, the legislature's decision may also be rooted in a number of other policy considerations.
>
> "* * * * *
>
> "In summary, the power of eminent domain may be exercised by an agency only if the agency has express statutory authority. The PUC does not have express statutory authority to promulgate rules that would effect a taking of an LEC's facilities."

321 Or. at 467-68, 900 P.2d 495. The *GTE* court then concluded that the collocation rules effected a "taking" under the federal constitution, and struck them down. *Id.* at 477, 900 P.2d 495.

The state relies on that portion of *GTE* that defines the "bright-line" rule concerning express eminent domain authority. That passage from *GTE* is significant, the state argues, because express eminent domain authority "is a key element of an inverse condemnation claim and of the right to seek compensation for a regulatory taking."

The state misreads *GTE*. *GTE* involved a straightforward eminent domain action in which the issue was whether the state could "take" certain property and, if so, what compensation was owed to the property owner. Unlike *GTE*, this case involves an *inverse condemnation* action in which plaintiff alleges that the state "took" plaintiff's property when it issued two orders that prevented plaintiff from logging on two separate occasions. The "bright-line" rule set forth in *GTE* applies in the eminent domain

context. In contrast, in an inverse condemnation action wherein a plaintiff alleges that a "taking" *has occurred* and the plaintiff seeks damages, *GTE* does *not* require a landowner to prove that an agency has express eminent domain authority as an element to an inverse condemnation action. Rather, the issue in this case is whether the application of OAR 629-24-809 to plaintiff's timber harvest plans *resulted* in a "taking." Plaintiff has alleged that application of the rule in this case *did* result in a taking. *GTE* does not stand for any proposition that would defeat circuit court jurisdiction in such circumstances.

In summary, we conclude that the Board shares concurrent jurisdiction with the circuit court in this case. The Board does not have primary jurisdiction. Consequently, plaintiff's complaint was properly before the circuit court, assuming that it otherwise properly pleaded a claim for relief for inverse condemnation. We hold that it did adequately plead such a claim in its first claim for relief. It did not do so in its second claim for relief.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to that court for proceedings consistent with this opinion.

APPENDIX O

IN THE COURT OF APPEALS OF THE STATE OF OREGON

[FILED: February 12, 2003]

93-2018; A 1 15966

BOISE CASCADE CORPORATION,
a Delaware corporation,
Appellant,

v.

BOARD OF FORESTRY,
Respondent.

Appeal from Circuit Court, Clatsop County.

Paula Brownhill, Circuit Judge.

Argued and submitted November 14, 2002.

Phillip D. Chadsey argued the cause for appellant. With him on the briefs were Charles F. Adams and Stoel Rives LLP.

David F. Coursen, Assistant Attorney General, argued the cause for appellant. With him on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Before Haselton, Presiding Judge, and Deits. Chief Judge, and Wollheim, Judge.

DEITS, C. J.

Summary judgment in favor of defendant reversed and remanded.

Deits, C. J., *vice* Armstrong, J.

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Prevailing party: Appellant

[X] Costs allowed, payable by: Respondent

APPELLATE JUDGEMENT

MONEY JUDGEMENT

Judgment #1

Creditor(s):	Boise Cascade Corporation
Debtor(s):	Board of Forestry
Costs:	$570.60
Attorney fees:	$-0-
TOTAL AMOUNT:	$570.60

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate judgment COURT OF APPEALS
Effective Date: September 17, 2003 (seal)

APPENDIX P

OREGON ADMINISTRATIVE RULES
COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 665. SPECIFIED RESOURCE SITE
PROTECTION RULES
Current through August 15, 2000

629-665-0210
Interim Requirements for Northern Spotted Owl Nesting Sites

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which caused owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.

(2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known,

includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection(1) of this rule is not in lieu of compliance with any federal

requirements related to the federal Endangered Species Act.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 11-1990(Temp), f. 12-20-89, cert. ef. 12-21-90; FB 5-1991, f. & cert. ef. 6-6-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-024-0809

APPENDIX Q

DEPARTMENT OF FORESTRY
DIVISION 680
RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

629-680-0000
Purpose

(1) OAR 629-680-0000 to 0430 shall be known as the Resource Site Inventory and Protection Process Rules.

(2) The purpose of the rules in OAR 629, Division 680 is to set criteria to inventory and protect special resources described in ORS 527.710 (3)(a) on forestlands regulated by the Forest Practices Act. Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Consistent with ORS 527.630, it is the policy of these rules to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water and fish and wildlife resources that assures the continuous benefits of those resources for future generations of Oregonians.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0010

APPENDIX R

OREGON ADMINISTRATIVE RULES
COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY
AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0010

Definitions

In addition to the definitions listed in OAR 629-600-0100, as used in OAR Chapter 629, Division 680:

(1) "Critical period of use" means the time of year the State Forester determines a species is sensitive to disturbance at a resource site.

(2) "disturbance" means actions which cause birds to flush from the resource site.

(3) "Endangered species" means any fish or wildlife species identified as "endangered" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "endangered" under the **Endangered Species Act of 1973** as amended.

(4) "Listed species" means a species adopted by the Board under OAR 629-680-0200.

(5) "Site productivity" means the ability of a resource site to produce the benefits for which it is being protected. As an example, nesting site productivity is measured by the number of young birds successfully raised. For a roosting site,

productivity is measured by the number of birds roosting over a given time. Watering site productivity is measured by the number of bandtailed pigeons that visit the resource site over a given time.

(6) Threatened species means any fish or wildlife species identified as threatened on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "threatened" under the **Endangered Species Act of 1973** as amended.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 523-91; FB 8-1991, f. & cert. ef. 10-30-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0020

APPENDIX S

OREGON ADMINISTRATIVE RULES
COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE
INVENTORY AND
PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0100

Process for Board Evaluation of Threatened and Endangered Fish and Wildlife Species that use Resource Sites that are Sensitive to Forest Practices

(1) When a species is listed as threatened or endangered by state or federal authorities, the Board shall adopt rules to protect resource sites that are used by those species and that are sensitive to forest practices. The following process shall be used when the Board develops protection rules for these resource sites:

(a) The Board's evaluation shall be based on the best available information summarized in a technical review paper.. The paper must be submitted by those proposing protection for resource sites used by a threatened or endangered species. The paper may be written by the State Forester, another agency, an organization or a person. The paper shall demonstrate how the resource sites are sensitive to forest practices. The paper may rely upon information used during the listing process and must:

(A) Identify the resource sites used by the species;

(B) Identify forest practices that conflict with the resource sites;

(C) Evaluate the biological consequences of the identified conflicts; and

(D) Propose protection requirements and exceptions for the resource sites.

(b) The State Forester shall review the technical paper submitted under subsection(1)(a) of this rule. The review shall include an evaluation of the literature used, consultation with technical experts and a technical review by experts chosen by the State Forester. The State Forester shall submit a report of this review to the Board.

(c) The Board shall review and accept or reject the information presented in subsections(1)(a) and (b) of this rule;

(d) Using the technical review paper and the State Forester's report, plus other available information for the species, the Board shall:

(A) Identify the resource sites for the species;

(B) Identify forest practices that conflict with the resource sites and evaluate the consequences of those conflicts;

(C) Determine the protection requirements for the resource sites; and

(D) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for resource sites used by the threatened or endangered species.

(3) The State Forester shall maintain an inventory of protected resource sites that are used by threatened or endangered species.

(4) When a threatened or endangered species is delisted by the Oregon Fish and Wildlife Commission or the U.S. Fish and Wildlife Service, the Board shall determine whether continued protection of resource sites is warranted:

(a) If the Board determines that continued protection rules are warranted, the rules shall be promulgated under the appropriate statutory authority;

(b) If the Board determines that continued protection rules are not warranted, existing rules shall be repealed.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0100

APPENDIX T

OREGON ADMINISTRATIVE RULES
COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY
AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0220

Process for Determining Forest Practices Conflicts and Consequences; Protection Requirements for the Resource Site

(1) The following process shall be used by the Board to evaluate forest practices conflicts and consequences and in setting appropriate protection for the resource site. Using the technical review paper developed in OAR 629-680-0200, plus other available information for each listed species, the Board shall:

(a) Identify the resource site for each listed species;

(b) Identify forest practices that conflict with the resource site and evaluate the consequences of those conflicts;

(c) Determine the protection requirements nec-
essary to protect the resource site;

(d) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for each species listed in OAR 629-665-0100.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0220

APPENDIX U

PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL

Including:

Formal Section 7 Consultation Guidance
Interim Recovery Strategy
Conservation Planning for Non-Federal Actions
Guidance for Incidental Take

U.S. Fish and Wildlife Service
Region 1
July 1990

This document was prepared by the U.S. Fish and Wildlife Service in Region 1, Portland, Oregon. For further information, please contact the following offices:

Mr. Wayne White, Field Supervisor
Fish and Wildlife Enhancement Field Station
U.S. Fish and Wildlife Service
2500 Cottage Way, Rm E-1823
Sacramento, California
FTS 460-4613 or 916-978-4613

Mr. Russ Peterson, Field Supervisor
Fish and Wildlife Enhancement Field Station
U.S. Fish and Wildlife Service
2600 SE 98th Ave.
Portland, Oregon 97266
FTS 429-6179 or 503-231-6179

Mr. Dave Fredrick, Field Supervisor
Fish and Wildlife Enhancement Field Station
U.S. Fish and Wildlife Service
Bldg. A, 2625 Parkmont Lane
Olympia, Washington 98502
FTS 434-9440 or 206-753-9440

Mr. Doug Smithey, Coordinator
Habitat Conservation Planning
U.S. Fish and Wildlife Service
1002 NE Holladay St.
Portland, Oregon 97232
FTS 429-6159 or 503-231-6159

Mr. Barry Mulder, Coordinator
Spotted Owl Program
U.S. Fish and Wildlife Service
1002 NE Holladay St.
Portland, Oregon 97232
FTS 429-6730 or 503-231-6730

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OWL PROCEDURES MANUAL

INTRODUCTION

With a listing decision now made for the northern spotted owl and an effective date of July 23, 1990, many people are wondering exactly what changes may occur to timber harvest programs in order to adequately protect the owl. In this document, the U.S. Fish and Wildlife Service (Service) describes its consultation, recovery, law enforcement (taking) guidelines, and conservation planning processes in an attempt to lay out procedures that are consistent with provisions of the Endangered Species Act (ESA), applicable on the effective date for listing of the northern spotted owl. With the cooperation of the other Federal agencies, as well as State and private entities, these guidelines outline the most efficient way of doing business under the ESA, at least for the first year after a listing, and would help meet the goals of other applicable laws and regulations.

PURPOSES

1. To provide clear examples of how ESA processes may work for the spotted owl.

2. To provide clarification of the Service's view of the Interagency Scientific Committee's (ISC) conservation strategy.

3. To put ESA spotted owl guidance in an understandable, manual-type format for distribution to Federal and non-Federal sectors as a working document.

BACKGROUND

SECTION 7 OF THE ESA—FORMAL CONSULTATION FOR FEDERAL ACTIONS

Federal agencies that fund, authorize, or carry out actions which "may affect" listed species must consult with the Service under Section 7. Federal actions that are nondiscretionary or that have "no adverse effects" on listed species are not subject to formal consultation. For timber harvest activities, the "may affect" standard applies to harvest activities within a ½ mile radius of any known nest site or pair activity center. The Service believes that these actions represent a threshold standard for timber activities requiring formal Section 7 consultation.

Formal consultation always results in a biological opinion issued from the service to the action agency. The opinion always makes a likely to jeopardize" or "not likely to jeopardize" finding for the action subject to formal consultation. The finding takes into account the environ-mental baseline condition of the listed species, plus the direct, indirect, interrelated, and interdependent effects attributable to the Federal action at hand, together with the cumulative effects of State and private actions reasonably certain to occur in the area of the Federal action.

Biological opinions may contain suggestions for project/action modifications, ranging from reasonable and prudent alternatives (only in a "jeopardy opinion") to reasonable and prudent measures/terms and conditions (mandatory elements of an incidental take statement) to conservation recommendations (suggestions which are left to the discretion of the action agency to implement).

Standards for the determination of incidental take are of particular significance to any future biological opinions for the northern spotted owl. Incidental take of listed species is "take" (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young.

The Service believes that incidental take also occurs for timber harvest activities which may harm or harass northern spotted owls. In order to define such activities which result in the most subtle type of incidental take, the Service convened a group of its biologists and developed incidental take guidelines which consider the biology of the owl throughout its range. Such guidelines are described later in this document.

SECTION 9 AND 10 OF THE ESA—TAKE FOR NON-FEDERAL ACTIONS

Take of endangered or threatened species is prohibited under Section 9 of the Endangered Species Act. The 1982 Amendments to the ESA gave the Service a procedure to authorize the incidental take of listed species by non-Federal parties in much the same way a Section 7 consultation (Incidental Take Statement) can authorize incidental take for Federal actions. Private parties whose otherwise lawful actions will result in incidental take of a listed species can apply for a permit authorizing such take by submitting a permit application and a Habitat Conservation Plan (HCP) to the Service.

Conservation Planning is a term that generally refers to the Section 10(a)(1)(B) permit process. This manual will go through the general procedures nec-

essary for a private party to submit a properly prepared permit application for processing.

SECTION 4 OF THE ESA—RECOVERY STRATEGY

The Service will ultimately have an approved recovery plan for every listed species, as set forth in Section 4 of the ESA. Right now, there are approved recovery plans for less than one-half of all listed species. Recovery plans set forth goals which, once achieved, can result in delisting the subject species.

An approved recovery plan is not necessary to carry out formal consultation under Section 7, to consider permit applications under Section 10, nor to enforce the prohibitions of "take" under Section 9. Nevertheless, recovery plans are useful planning tools and may help guide and coordinate all conservation gained through Section 7 and Section 10, and focus such conservation actions on recovery and delisting. This manual will focus on the existing knowledge available, especially the ISC report, and make suggestions as to how the agencies can utilize such information as a potential recovery strategy.

DISCUSSION AND EXAMPLES

FORMAL CONSULTATION UNDER SECTION 7

It is the responsibility of the action agency (e.g., Forest Service and Bureau of Land Management) to determine which actions "may affect" threatened or endangered species, and to initiate consultation with the Service. As noted above, "may affect" situations for the owl are defined as those activities that involve harvest or related activities within spotted owl habitat, and/or harvest activities which may pose disturbances to nesting pairs within ½ mile of any

known nest site or pair activity center, regardless of the suitability of the habitat.

Suitable habitat selected by northern spotted owls was described in the (ISC) conservation strategy as typically exhibiting ". . . moderate to high canopy closure; a multiplayered, multispecies canopy domi nated by large overstory trees; a high incidence of large trees with large cavities, broken tops, and other indications of decadence; numerous large snags; heavy accumulations of logs and other woody debris on the forest floor; and considerable open space within and beneath the canopy. These attributes are usually found in old growth, but they are sometimes found in younger forests, especially those that contain remnant large trees or patches of large trees from earlier stands. In younger forests that support breeding owls, the nest and major roost sites are usually found where large trees from the earlier, older stands remain." It is important to note that the age of forests is not as important a factor in determining habitat suitability as are vegetational and structural components. Areas where consideration of spotted owl habitat may be especially important in consultation are: 1) habitat that is currently occupied by owls, 2) Habitat Conservation Area as defined in the ISC conservation strategy, and 3) areas of special concern as defined in the Service's 1989 Status Review Supplement.

Once the action agency has made the "may affect" determination, a written request should be made to the Service for formal consultation. This request should be accompanied by an assessment of the action and its impacts, and contain the following general categories of information (a more detailed

outline for a biological assessment is provided in Appendix 1):

1. a description of the action to be considered;

2. a description of the specific area that may be affected by the action;

3. a description of any listed species or critical habitat that may be affected by the action;

4. a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

5. relevant reports, including any environmental impact statement or environmental assessment; and

6. any other relevant available information on the action, the affected listed species, or critical habitat.

After review of this information, the Service then prepares a biological opinion which includes:

1. an analysis of the direct and indirect effects, as well as the effects of interrelated and interdependent activities, and cumulative effects of reasonably certain State or private activities in the action area;

2. a biological opinion on whether the action is "likely to jeopardize" or "not likely to jeopardize" the continued existence of the species (reasonable and prudent alternatives will generally be provided if the opinion indicates that the proposed action is likely to jeopardize the continued existence of the species);

3. an incidental take statement which will identify the anticipated level of incidental take that will occur, and provide reasonable and prudent measures and terms and conditions for minimizing incidental take; and

4. conservation recommendations that, if implemented, would minimize impacts and promote the conservation of the species.

Reasonable and prudent measures and terms and conditions to minimize incidental take are mandatory, as are reasonable and prudent alternatives in a jeopardy opinion, and should be carried out by the action agency. Implementation of conservation recommendations, although strongly encouraged by the Service, is at the discretion of the action agency. A general outline for biological opinions is shown in Appendix 2.

The Forest Service and Bureau of Land Management (BLM) are considering dividing their sales into 3 categories for purposes of formal consultation:

1. all sold sales sold prior to FY-89;

2. planned and sold sales for FY-89 and 90 (Section 318 sales, and sales previously in conference); and

3. FY-91 planned sales.

Each Federal action "package" will result in a separate biological opinion issued by the Service to the Forest Service and the BLM (assuming both action agencies utilize similar consultation "packaging"). The Service is committed to issuing biological opinions on categories 1 and 2 within 30 days of receipt of the additional information necessary to

complete the administrative record (and as close as possible to any effective date of a listing).

In each biological opinion the Service would provide conservation recommendations and an Incidental Take Statement (where appropriate) based on the Interagency Cooperation Regulations found at 50 CFR Part 402. To display possible results from such opinions, and assuming the occurrence of incidental take, we have prepared a list of examples of reasonable and prudent measures that would minimize or avoid incidental take, and listed conservation recommendations that are applicable to incidental take (see Table 1). We have further divided the list into two parts. Measures and recommendations that are (1) based upon the ISC Conservation Strategy or (2) based upon current management plans. Departure from these "example" reasonable and prudent measures and conservation recommendations may be advised, if through coordination with the Service, it is determined that sound biological data and reasoning indicate that the species would benefit from such a departure.

Appendices 3A and 3B provide examples of possible conservation recommendations, applicable under Section 7(a)(1), that may further promote the conservation of the species. Similarly, the first list (Appendix 3A) is based upon the ISC Conservation Strategy, while the second (Appendix 3B) is based upon current management direction. These recommendations are not mandatory and are intended to provide an opportunity for the agency to further the conservation of the owl.

Comparisons between timber harvest actions "with ISC Strategy" and "without" were made at the request of the Department of the Interior. At the

time of this writing, there are no other conservation strategies developed and presented for similar comparisons. If appropriate, future versions of this manual may analyze the likely conservation actions that would be called for under Section 7 if other, yet unknown, strategies were considered.

In the meantime, the ISC Conservation Strategy represents the most current management advice, developed through a multiagency working group that included the most knowledgeable owl experts. The strategy provides a long-term approach to owl management, consisting of major elements, that in combination comprise an integrated approach to conservation of the species. Deviations from the strategy in the short-term increase risk to its long-term success. Thus, the strategy provides a conservation goal against which all future actions will need to be measured. Since the strategy acknowledges the loss of habitat in conservation areas only through the 1990 sale program, it may be necessary to prepare a new or updated conservation strategy if the ISC's recommendations are not implemented in full prior to contracting 1991 sales.

Table 1. Examples of Reasonable and Prudent Measures Under Conservation in Incidental Take Statements for Federal Actions as Well as Applicable Conservation Recommendations

Reasonable and Prudent Measures and Conservation Recommendations Related to Incidental Take

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
Sold Sales (pre-89 and FY-89/90 sold sales including sales under Section 318)	Sales are under contract, expense is high to modify contract.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1990 Planned but Unsold Sales, including Sales proposed under Section 318	Limited time available to make adjustments during the planning process and coordinate the changes before fiscal year 1990 contracting deadlines. Additional expenses may be necessary to make changes.	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.) Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside proposed HCAs.	Reasonable and Prudent Measures: Protect pairs of spotted owls within HCAs by providing a 2 mile buffer around the pairs activity center. Outside HCAs protect 80 acres surrounding pair activity centers (as specified in the ISC Strategy). Implement seasonal restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Eliminate or relocate timber harvest to areas outside HCAs.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1991 and Future Sales	No known limitations	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.) Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside HCAs.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny that are located outside HCAs. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

It is not possible to determine an exact point at which the continued existence of a species would be at jeopardy without fully analyzing proposed actions in relation to the environmental baseline. Therefore, the Service will analyze each Federal action submitted for formal consultation in turn and will make the "likely jeopardy/not likely jeopardy" finding on a case-by-case basis.

INCIDENTAL TAKE GUIDELINES UNDER SECTIONS 7 AND 10

The taking of any listed species is generally prohibited under Section 9 of the ESA and implementing regulations. There are, however, a number of exceptions to the taking prohibition.

The 1982 Amendments to the ESA gave the Service procedures to authorize the "incidental take" of listed wildlife species. These procedures are contained in Sections 7 and 10 of the ESA. "Incidental take" in this context is take which is "incidental to, and not the purpose of, carrying out otherwise lawful activities" (See 16 USC 1539 and *Sec.* 10(a)(1)(B) of the ESA).

The Service offers the following general guideance to address "incidental" take of northern spotted owls that may occur incidentally to timber harvest or related activities. The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act.

It is important to note that the Service fully intends to consider all requests for incidental take

authorizations under Section 7 (Federal) or Section 10 (State and private) of the Act, as appropriate. These interim guidelines are intended to present, to the best of our ability, guidance for addressing the need for incidental take authorization; and therefore to provide guidance for reducing potential conflicts with Section 9 of the Act.

An obvious incidental take situation would exist if an otherwise lawful timber harvest activity would result in the direct loss of any individual (adult or young), or an active nest (with young or eggs). It is more difficult to determine when incidental take of owls might occur as a result of altering habitat surrounding a nest site or activity center of a pair of spotted owls.

Even more difficult is assessing when owls may be harmed or harassed by cutting within their home range. In these less obvious situations, the Service recommends that the project proponent initiate a dialogue with the Service to discuss the potential risk of incidental take. In the absence of such a dialogue, the Service offers the following stepwise approach which we believe is a reasonable procedure to reduce the risk that incidental take will occur. If the person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

The focus of our incidental take guidelines is on northern spotted owls, including their eggs and young. We therefore recommend the following stepwise approach to avoid and reduce the risk of incidental take:

1. Conduct spotted owl surveys during the breeding season and prior to any harvest activity according to the Forest Service protocols addressed in the Interagency Scientific Committee report. The Service may suggest other owl survey techniques in the near future. Such surveys should be a standard practice for planning timber harvest activities.

2. Avoid any harvest activity which results in less than 70 acres of the best suitable owl habitat encompassing the nest site and/or activity center of a pair of spotted owls.

3. Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site and/or activity center. The 500 acres may include the 70 acres in No. 2 above and should be as contiguous as possible.

4. Avoid any harvest activity which results in less than 40 percent coverage by suitable owl habitat within a circle with a radius centered on a nest site/or center of activity and as prescribed by physiographic province (see Table 2). The 40 percent may include the acreage required in No. 2 and No. 3 above.

The Service recognizes that there is variation among individuals. Specific information on home range size, habitat use, nest site, or the center of activity of well-studied owls in similar habitat in the same portion of the range could be used to justify an exception to these guidelines and continue to avoid incidental take. In addition, habitat use information on which the above recommendations are based (see ISC 1990, USDI 1990) may change as a result of

more recent studies, and the Service will continue to update its database to ensure that the most recent information is included.

To summarize the procedures for pursuing incidental take authorization for non-Federal activities, if incidental take is identified as a concern on State or private lands, individual landowners should consider development of a habitat conservation plan. The Section 10 (a)(1)(B) permit application can be submitted separately by individual applicants or through the appropriate State agency as described in the discussion on Section 10 permits in this document. The Service strongly encourages a pre-application dialogue with any potential permit applicant at any time.

Table 2. Calculations to Develop Incidental Take Guidelines Based Upon Home Range Size by Physiographic Province [1]

Province	Median Home Range Size		40 Percent of Median Home Range Size
	Acres	Radius	Acres
WASHINGTON			
Olympic Peninsula	9900	2.2 miles	3960
Cascades	6600	1.8 miles	2640

[1] The Service will continue to revise this table as more data become available.

OREGON			
Cascades	2500	1.2 miles	1000
Coast Range	3400	1.3 miles	1360
Klamath	2500	1.2 miles	1000
CALIFORNIA			
Klamath	2500	1.2 miles	1000

References:

Interagency Scientific Committee. 1990. Conservation strategy for the northern spotted owl. Report of the Interagency Scientific Committee to address the conservation of the northern spotted owl. U.S. Department of Agriculture, Forest Service, and U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, and National Park Service. Portland, Oregon.

U.S. Department of the Interior. 1990. 1990 Status Review. Northern Spotted Owl. Report to the U.S. Fish and Wildlife Service. Portland, Oregon.

HABITAT CONSERVATION PLANNING UNDER SECTIONS 9 AND 10

A permit from the Service pursuant to Section 10(a)(1)(B) of the ESA authorizes incidental take much as a Section 7 consultation does through an "Incidental Take Statement" for Federal actions. However, Section 10 of the ESA typically applies to non-Federal actions. Individuals, corporations, non-Federal government entities, States, and other parties can apply for an incidental take permit by

submitting an application and a habitat conservation plan to the Service. "Conservation Planning" is the term often used to refer to this process. In the case of the owl, the Service recommends maximizing efficiency of effort by developing a habitat conservation plan which includes the incidental take requests for a number of entities through the appropriate State land-managing agency.

The issuance of an incidental take permit by the Service is contingent upon the applicant's development of a Service-approved conservation plan for the listed species affected by the subject project or action (a more detailed document, "Draft Conservation Planning Guidelines," is available from the Service's Portland Regional Office). Such a conservation plan must specify:

1. the anticipated impacts likely to result in take of listed species;
2. the mitigation and monitoring measures the applicant will undertake to alleviate the impacts of the taking;
3. alternative actions to such taking that were considered;
4. why these alternatives were not employed;
5. funding that will be provided to implement the mitigation measures and attendant conservation plan; and
6. additional measures that the Service may require as necessary or appropriate for the conservation of the species.

Because applicants may have difficulty in adequately addressing these conservation planning needs independently, the Service generally works

with an applicant throughout the pre-application phase. Adequate quantification of impacts (i.e., incidental take) usually requires that the applicant: (1) define the conservation planning area, (2) collect necessary biological data on the species of concern, and (3) detail the proposed activities likely resulting in incidental take.

Upon receipt of the application and conservation plan, the Service may issue an incidental take permit if it determines that the following conditions have been met:

1. the taking will be incidental to the action;
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking;
3. the applicant will ensure that adequate funding will be provided for the conservation plan and procedures to deal with unforeseen circumstances;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the subject species in the wild;
5. the applicant will ensure that other measures required by the Service will be provided; and
6. the plan will be implemented.

The third item above generally requires the development of an implementing agreement, which is a legal document binding all implementing parties to the proposed conservation plan.

The Service must also address the National Environmental Policy Act (NEPA) in the ESA Section

10(a)(1)(B) permit process. In most cases the Service delegates the development of information needed for preparation of NEPA documentation to the applicant to expedite the process. In general, if the incidental take permit will result in a significant net loss of individuals and/or habitat, an EIS likely will be required. This often adds 9 months to 1 year to the process. Conversely, if the permit will result in a net gain or insignificant net loss of individuals and/or habitat, an environmental assessment leading to a finding of no significant impact likely will be sufficient for NEPA compliance. In such a scenario, a permit could be considered for issuance in as little as 3 months.

Section 10 and Northern Spotted Owls

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be party to take on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of ESA. The implications for the northern spotted owl are considerable, since a large portion of the total harvest volume in the owl's range comes from non-Federal lands. At least in California, important numbers of owls occur on private lands; there are fewer owls on private lands in Washington and Oregon.

There are two approaches to managing the Section 10 process for spotted owls. One is for the individual landowner to prepare an HCP and apply for an incidental take permit for his lands. The second is for the State to prepare an HCP for all state and private timber lands. The Service would prefer to proceed with the latter approach, since it would add efficiency to the conservation planning process.

The States of Washington, Oregon, and California are at different stages in this process. In Washington and Oregon, the Service has notified the States of their potential responsibilities and initial informational discussions are beginning. In California, the State Board of Forestry, Department of Forestry, Department of Fish and Game, industry representatives, and the Service have been meeting regularly since November, 1989.

The State of California is planning to prepare an HCP covering timber management throughout the range of the subspecies in the state. The California HCP and accompanying NEPA process probably may not be completed until sometime in 1991. During the interim period, the State would attempt to prevent take through a review process that supplements its existing timber harvest permit procedure. In the meantime, large industrial timber firms have indicated their intent to proceed with individual HCPs.

RECOVERY PLANNING UNDER SECTION 4

Section 4(f) of the Endangered Species Act requires development and implementation of recovery plans for listed species. Recovery actions are meant to arrest or reverse the species' decline and neutralize the threats to its survival so that its long-term survival in the wild can be ensured.

A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of the species. Coordination among Federal, State, local agencies, organizations, and private entities is essential. Although recovery plans do not commit manpower or funds, they must identify site-specific management actions, estimate the time

frame and costs for recovery, identify research needs, and establish measurable goals for recovery.

A recovery plan contains three parts. Part 1 is an overview of the species, its biology, life history, habitat requirements, and discussion of the threats that have led to its listing as an endangered or threatened species. Part 2 identifies the Service's goals and objectives for recovery of the listed species. These are presented in a step-down outline that recommends the steps that should be taken to help recover and delist the species. In most cases these recommendations are research oriented. Any recommended management actions may require NEPA documentation prior to implementation. Part 3 provides an implementation schedule that identifies the key players and the costs associated with recommended projects.

Development of a recovery plan requires a public review process prior to approval of the plan. There are no specific time frames associated with the development of a recovery plan, and a plan is not necessary for the Service to conduct Section 7 consultation, carry out research and management activities, or identify goals and objectives for the species. If the Service follows the normal procedure for producing a recovery plan, it is anticipated that two years would be required to complete the necessary steps before a plan would be finalized. A process for developing a recovery plan under these circumstances is described in Appendix 4. Specific guidelines that describe the recovery planning process are available from the Service.

Interagency Scientific Committee Conservation Strategy

The Fish and Wildlife Service, Forest Service, Bureau of Land Management, and the National Park Service entered into a charter under the 1988 Interagency Agreement on spotted owls to establish an Interagency Scientific Committee (Committee). This Committee was also recognized by Congress in Section 318 of Public Law 101-121. The purpose of this Committee was to assess all available information on the management and biology of the northern subspecies and recommend a strategy for the conservation of the northern spotted owl. The Committee submitted "A Conservation Strategy for the Northern Spotted Owl" to report to Congress and the four agencies on April 4, 1990. The Forest Service must report to Congress on its intentions towards management of the owl by September 30, 1990.

As noted above, the Committee has produced a scientifically credible strategy for the long-term viability of the northern spotted owl. The agencies have endorsed the science associated with this plan, and are presently reviewing it to determine its acceptability as an approach to managing the owl under their multiple-use responsibilities. The Committee has utilized the best scientific information available, including contact with or the participation of all the most knowledgeable spotted owl experts in the process to develop this strategy.

The Service believes that this report represents the most comprehensive and in-depth analysis of the data available. The Service fully endorses the scientific credibility of the report and its applicability as a management approach for the northern spotted

owl. Given this, the Service is reviewing this document for its applicability as a recovery plan under the Endangered Species Act (see Appendix 4).

This process followed to produce the ISC's plan has met two of the Service's requirements for development of a recovery plan. First, the most knowledgeable owl experts available, representing all major constituencies, were involved in its development. Secondly, the best available information was used to develop the strategy. Establishment of recovery goals, evaluation of the conservation strategy relative to these goals, and inclusion of a public review process would be required to complete the process.

In the interim, the Service strongly recommends that the agencies consider implementation of the conservation strategy, as fully described by the Committee. Acceptance and implementation of the strategy, as recommended, would provide a sound basis for Section 7 consultation, help address the issue of take on Federal and private lands, and reduce concern over the economic impacts of recovery and species management.

The conservation strategy includes a process for revision of the strategy as more and better information becomes available. In addition, the Service has recently established a coordinating committee under a 1990 interagency agreement (Attachment 5) with the States of California, Oregon and Washington, and the USDA Forest Service, Bureau of Land Management, and National Park Service. The intent of this new agreement is to provide a forum to coordinate the management and conservation of the northern spotted owl. The Services believes that these processes allow for an open and appropriate

forum for consideration and inclusion of recovery goals, other issues that may arise, as well as adjustment of the strategy itself that may be required during its implementation.

CONCLUSION: OWL PROCEDURES MANUAL

The Tables and Appendices noted in the narrative are attached. The Owl Procedures Manual will be updated and augmented as new information becomes available. Components of future consultations, such as development of incidental take statements, will generally follow the direction of this manual, but may change based on new biological information and professional judgment.

APPENDICES

to

OWL PROCEDURES MANUAL

APPENDIX 1: Biological Assessment Information

In general, biological assessments for the pre-1989 and 1989-1990 timber sale programs should contain the following information. The Service will work with the agencies to identify the data needs for future sale reviews.

Biological Assessment Format

1. Introduction

   — Brief summary of the objectives of the Biological Assessment; reference the Forest plans or timber plans under which sales were prepared.

   — Address other listed species (species for which the "may affect" standard applies, or acknowledgement that such species have been consulted on separately).

2. Description of the Proposed Action

   — Description of the Forest Service's Pacific Northwest and Pacific Southwest Regions or the BLM Districts in Oregon including total acreage, description and amount of forested acres, and owl habitat information such as amount, distribution, etc., by land area under consideration. This information should be totalled by physiographic province and Forest or BLM District.

— Description of the timber sale program being addressed.

— For pre-1989 sales, where discretionary authority is retained, provide the following information, totaled by physiographic province and Forest or BLM District:

a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.)

b. number and list of "no effect" sales and justification for this determination.

c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat.—indicate in the two lists above those sales that are located fully or partially within HCAs, SOHAs, Areas of concern, and/or ODFW/BLM agreement sites.

— For 1989-1990 sales, provide the following information, totalled by physiographic province and Forest or BLM District;

a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.);

b. number and list of "no effect" sales and justification for this determination;

c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat, for both discretionary and non-discretionary sales; also indicate if the sale has been surveyed 0, 3, or 6 times, and whether the sale complies with the 50-11-40 rule

d. indicate in the lists above, those sales that are located fully or partially within HCAs, SOHAs, Areas of Concern, and/or ODFW/ BLM agreement sites.

e. description of other activities that may be subject to future Section 7 consultation.

3. Description of the Affected Environment

— Definition of spotted owl habitat and the amount in acres within each physiographic province, Forest and BLM District.

— Biological data on listed species (historical use, presence, potential use); information and/or other documents containing such information may be incorporated by reference

— Spotted owl information (from data bases, 1985 to Present) should include information on all owls, pairs and singles, and those unaffected by the timber sale programs.

4. Analysis of the Effects of the Action

— General description

— Direct and indirect effects such as habitat loss, dispersal habitat, number of owl pairs affected, etc. Indicate the amount of owl habitat (distinguish dispersal habitat when possible) proposed to be removed or altered (from partial harvest) in each physiographic province and Forest. This section should also include a summary analysis of effects on owl pairs from any or all of the following: sales within 0.5 mile of activity centers/nest sites; sales within 2.1/2.5 miles (home ranges); sales within 2.1/2.5 miles, where habitat would be reduced to below the minimum used by owl

pairs in that province; and sales within Areas of Concern, as described in the Service's 1989 Status Review on the owl. It is important that this summary reflect the cumulative impacts to an owl pair from all sales affecting the pair.

— Interrelated and interdependent actions such as roads, silviculture treatments, recreational projects, etc.

— Cumulative impacts—future State and private actions, especially when these activities would affect owl pairs with home ranges overlapping federal and state or private lands.

— Brief discussion of other listed species—provide an analysis of effects of the action to other listed species.

5. Alternatives Considered

— Brief discussion of alternatives for sale, etc.

— Describe conservation measures implemented to reduce or minimize impacts to spotted owls or habitat.

— Prepare a contingency plan for situations where owl pairs are found in active timber sales.

— Summary of program changes as a result of the above (for 318 package). Forest Service Region 5 will provide changes in the 1989-1990 sales program.

6. Conclusions (for the timber sale package submitted for formal consultation)

   — How will the action (package) affect each listed species:

      a. no adverse affect;

      b. may adversely affect; or

      c. may beneficially affect?

   — Request consultation for those which may affect (adversely or beneficially).

Information Needs

To aid our analysis of impacts to owls in the biological opinions, and to complete our administrative record, the Service has requested that the agencies provide information, in a Table format, on owls and owl habitat.

   — Number and list of owl pairs and singles (including those whose status is unconfirmed), by Forest or BLM District. This list should include those pairs whose home range or 2.1/2.5 miles radius circle overlaps adjacent state or private lands.

   — For each owl pair affected by the program, provide the following information:

      a. pre-harvest acres of suitable habitat available to the pair within 0.5 miles and between 0.5 and 2.1/2.5 miles.

      b. acres of owl habitat removed within those distances, for each sale and for all sales (cumulative); and

c. whether the pair is located in an area of concern, HCA, SOHA, or ODFW/BLM Agreement area.

— Database tables for individual timber sales brought forward for consultation.

— Short narratives from each Forest and BLM District to address selected parts of the above outline and summarize the biological evaluations for each sale.

The following provides a description of the general format that the Service follows when it provides a biological opinion to an action agency under Section 7 of the ESA.

APPENDIX 2: BIOLOGICAL OPINION FORMAT

Biological Opinion Format

1. Introduction

    a. Identify the issue and species in consultation

2. Biological Opinion

    a. Succinct statement (. . . is/is not likely to jeopardize, . . . will/will not adversely modify critical habitat) for each species.

3. Description of the Proposed Action

    a. Cite Public Notice, EIS, plan document, or rationale for packaging from biological assessment.

    b. Include interrelated, interdependent actions considered.

4. Species Account

    a. Status and biology of listed and proposed species.

5. Effects of the Proposed Action on Listed Species

    a. Cite past Opinions to same agency, recovery plans, Biological Assessments, etc., for species accounts.

    b. Include species information relevant to action area.

c. Explain effects that are adverse or beneficial.

d. If jeopardy, stress aspects that cause jeopardy.

e. Provide a basis for reasonable and prudent alternatives, and/or conservation recommendations.

6. Cumulative Effects

7. Reasonable and Prudent Alternatives

a. If appropriate, but only for jeopardy findings.

8. Incidental Take

a. Include sections in order.

1. anticipated incidental take.

2. reasonable and prudent measures to minimize incidental take.

3. terms and conditions necessary to implement reasonable and prudent measures.

4. instructions on disposition of dead animals.

b. See Table 1 in this document

9. Conservation Recommendations

a. See Appendices 3A and B in this document.

10. Closing

11. Literature Cited

APPENDIX 3A: Section 7 Consultation—Example Conservation Recommendations likely to be Recommended if the Interagency Scientific Committee Conservation Strategy Serves as the Basis for Consultation

The Service will provide conservation recommendations under Section 7(a)(1). These recommendations are not mandatory, but are intended to assist the agency in implementing actions that may result in the conservation of the owl.

1. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the total number of owls impacted and at what levels; and the total amount of owl habitat removed from the environmental baseline.

2. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

3. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

4. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long term, create or restore the necessary components of owl habitat. Consider

testing the following prescriptions on a site specific basis, as appropriate:

a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinate with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

    1. Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting,

roosting, and foraging activities of spotted owls; and

g. Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

5. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

6. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

7. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

8. Consider reducing the annual allowable sale quantities to facilities implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

9. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 3B: Section 7 Consultation—General Conservation Recommendations Likely to be Recommended if the Interagency Scientific Committee Conservation Strategy does Not Serve as the Basis for Consultation

These recommendations are based upon the Service's knowledge of current management scenarios being pursued by the Forest Service (SOHA system) and Bureau of Land Management (ODFW agreement areas).

1. Eliminate or relocate the timber sales/units that are within 0.5-miles of a pair, and/or would reduce the amount of owl habitat to less than the minimum known to be used by owl pairs in each province.

2. Eliminate or relocate timber sales/units in areas of special concern (as identified in the Service's 1989 Status Review) unless an interagency plan for the conservation of dispersal habitat has been implemented.

3. Prioritize timber sales so that sales not impacting spotted owl pairs and/or spotted owl habitat are contracted first. Sales which have a minor impact should be contracted second, and sales that have a major impact should be offered last and only when absolutely necessary.

4. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the number and kinds of recommendations that are implemented; the total number of spotted owls impacted and to what degree; and the total amount of spotted

owl habitat removed from the environmental baseline.

5. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

6. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

7. Management plans should be developed, in coordination with state and Federal wildlife agencies and the Forestry Sciences Labs, to provide for the long-term development and maintenance of nesting, foraging, and dispersal habitat necessary to maintain the northern spotted owl. Particular attention should be paid to avoiding impacts to spotted owls and restoring habitat within the identified areas of special concern.

8. Timber harvest activities should be minimized within relatively large, contiguous blocks of spotted owl habitat. Consider aggregating, instead of dispersing, these activities within the forest landscape, to avoid increasing fragmentation of remaining spotted owl habitat. Allow for changes in harvest prescription, from clearcut to commercial thinning or individual tree marking, to preserve necessary owl habitat components.

9. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long-term, create or restore the necessary habitat components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

   a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

   b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

   c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinated with fire and pest management specialists.

   d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

   e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

   f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

      — Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the

upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

— Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

10. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

11. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

12. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

13. Consider reducing the annual allowable sale quantities to facilitate implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

14. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 4: Recovery Strategy

Approach 1: If the agencies implement the ISC conservation strategy as a management plan for the northern spotted owl, the Service can use this approach as an interim recovery plan while the strategy is being assessed through the recovery planning process for its applicability and acceptability as a formal recovery plan. Therefore, the Service recommends the following approach:

June/July 1990

— The agencies indicate their acceptance and intentions towards implementation of the Conservation strategy.

— The Service will convene a group of recognized experts (which may include members of the Scientific Committee and the Listing Review Team) to review the strategy in relation to the requirements and mandates of the Endangered Species Act and the feasibility of adopting the ISC plan for recovery planning purposes.

July 1990

— A report will be provided to the Service on the applicability of the ISC Conservation Strategy as a recovery plan.

— The Service will announce a decision to proceed with the recovery planning process using either the Conservation Strategy or another approach.

    — If the Conservation Strategy is appropriate as a recovery plan, the Service will pursue its obligations to consider public input prior to finalization of the document as a recovery plan and to complete the planning processes.

— If the Service decides to pursue development of another recovery planning document, procedures described in Approach 2 would be followed.

January 1991

— Finalize and approve recovery plan (if the ISC strategy is the recommended approach).

Approach 2: If the Service follows a normal process for developing a recovery plan, it is recommended that a "classic" scientific recovery team be established for the owl. Through the ISC team effort and the Listing Review Team there are a number of highly qualified persons identified as good candidates to serve on the Team. As a mechanism for the science of recovery to interface with land management concerns, the Team Leader should participate in the Interagency Northern Spotted Owl Conservation Group (formally ISOC) meetings. The ISC report provides a good starting point for a recovery plan; the Service will need to look closely at this document in establishing recovery goals and objectives.

July 1990

— Send out letters to agencies, universities, etc. requesting nominations to recovery team. Expertise will be sought in the following areas:

1. northern spotted owl ecology,
2. conservation biology,
3. population genetics,
4. population ecology,

5. biogeographical modeling with expertise in geographic information systems; and

6. old growth forest management.

August 1990

— Select recovery team, and schedule first team meeting.

September 1991

— Complete draft recovery plan for public review and comment.

March 1992

— Finalize and approve a recovery plan.

April 1992 and Beyond

— Implement the recovery plan. This could be done using an implementation team approach. Representatives would include those from: Forest Service, Bureau of Land Management, State wildlife agencies, State forestry departments, timber industry, and environmental groups.

— A management oversight group and technical group could be formed to advise the Service (oversee) research and management actions affecting recovery of the northern spotted owl.

APPENDIX 5: 1990 Interagency Agreement (attached)

MEMORANDUM OF AGREEMENT

AMONG

STATE OF CALIFORNIA
THE RESOURCES AGENCY

STATE OF WASHINGTON
DEPARTMENT OF WILDLIFE,

STATE OF OREGON
DEPARTMENT OF FISH AND WILDLIFE,

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE,
BUREAU OF LAND MANAGEMENT,
NATIONAL PARK SERVICE,

AND

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

TO ESTABLISH AN INTERAGENCY
NORTHERN SPOTTED OWL
CONSERVATION GROUP

This Memorandum of Agreement ("Memorandum") is entered into this 13th day of April, 1990, among the State of California Resources Agency, the Oregon Department of Fish and Wildlife, the Washington Department of Wildlife, the U.S. Fish and Wildlife Service, the USDA Forest Service, the Bureau of Land Management, and the National Park Service (collectively called the "Public Agencies").

WHEREAS, all parties to this Memorandum of Agreement recognize that they each have responsibilities under their statutory authorities that cannot be delegated and that this Memorandum cannot and is not intended to abrogate any of their independent decision-making responsibilities, and

WHEREAS, the Public Agencies are among the Federal and State agencies that have regulatory authority or responsibility under certain Federal and State statutes to manage for the northern spotted owl (*Strix occidentalis caurina*) and its habitat, and

WHEREAS, the multiple sources of authority under which the Public Agencies operate do not provide any individual agency with the authority to implement a comprehensive program to provide for the long-term conservation of the northern spotted owl across its historic range, and

WHEREAS, the Federal Agencies have entered into an interagency agreement to cooperate in ensuring the conservation of the spotted owl, and

WHEREAS, the Public Agencies desire that their activities, to fulfill their respective responsibilities with regard to the conservation of the northern subspecies of the spotted owl, be coordinated in such a manner as to ensure effective, timely, and mutually beneficial use of financial and personnel resources, and

WHEREAS, the Public Agencies share the common goal of ensuring the conservation for the northern spotted owl,

THEREFORE, it is mutually agreed and understood that:

PURPOSE OF MEMORANDUM

The Public Agencies have entered into this Memorandum to establish an Interagency Northern Spotted Owl Conservation Group to develop and ensure compliance with cooperative programs related to the conservation of the northern spotted owl.

INTERAGENCY NORTHERN SPOTTED OWL CONSERVATION GROUP

Secretary, State of California, The Resources Agency

Director, State of Washington, Department of Wildlife

Regional Director, U.S. Fish and Wildlife Service, Portland, Oregon

Regional Forester, U.S. Forest Service, Portland, Oregon

Director, Pacific Northwest Experiment Station, Portland, Oregon

Regional Forester, U.S. Forest Service, San Francisco, California

State Director, U.S. Bureau of Land Management, Portland, Oregon

State Director, U.S. Bureau of Land Management, Sacramento, California

Regional Director, National Park Service, San Francisco, California

Regional Director, National Park Service, Seattle, Washington

Director, State of Oregon, Department of Fish and Wildlife

OPERATION

1. The Regional Director of the U.S. Fish and Wildlife Service shall chair the Interagency Northern Spotted Owl Conservation Group (Interagency Group) for a period of 2 years from the date of execution of this agreement.

Chairperson of the Interagency Group shall rotate on an annual basis among the participating agencies. Future chairpersons will be chosen by the Interagency Group.

2. The Interagency Group will meet as frequently as agreed upon by a majority of the voting members. Meetings shall be called by the Chairperson.

3. The Interagency Group may establish, or rely on, existing coordinating or working groups, as necessary or appropriate, to address specific issues relative to northern spotted owl conservation.

RESPONSIBILITIES

1. Identify, consider, and recommend, as appropriate, management and research activities for the conservation of the northern spotted owl.

2. Direct activities of any coordinating or working groups established by the Interagency Group.

3. Exchange information, coordinate, and provide standards and guidelines for needed management, monitoring, and research activities related to the conservation of the northern spotted owl.

4. Serve as a discussion forum for and liaison with all interest groups to serve as a common source of information and to address identified problems or conflicts.

TERM AND AMENDMENTS

This agreement is subject to all applicable laws and regulations. This Agreement may be amended upon the written consent of all parties. Parties to this Agreement may withdraw from this Agreement at

any time upon written notice to the Interagency Group chair.

All signatories to this Memorandum agree to seek mutually agreeable solutions to achieve its purposes.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum, on the date(s) set forth, as of the day and year last written.

Memorandum of Agreement to Establish an Interagency

Northern Spotted Owl Conservation Group

By /s/ unreadable Date April 13, 1990
Director, State of Oregon
Department of Fish and Wildlife
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Director, State of Washington
Department of Wildlife
Olympia, Washington

By /s/ David M. Jay Date 4-13-90
for Regional Forester
U.S. Forest Service
San Francisco, California

By /s/ unreadable Date 4-13-90
Regional Forester
U.S. Forest Service
Portland, Oregon

By /s/ unreadable Date 4/13/90
Director
Pacific Northwest Experiment Station
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Regional Director
U.S. Fish and Wildlife Service
Portland, Oregon

By /s/ unreadable Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Sacramento, California

By /s/ Elaine Y. Zelinski Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Portland, Oregon

By /s/ unreadable Date April 19, 1990
for Regional Director
National Park Service
San Francisco, California

By /s/ unreadable Date April 13, 1990
Acting Regional Director
National Park Service
Seattle, Washington

By /s/ unreadable Date April 19, 1990
Secretary, State of California
The Resources Agency
Sacramento, California

APPENDIX V

BEFORE THE BOARD OF FORESTRY
OF THE STATE OF OREGON

DOJ Case No. 629-430-NR002-92
Hearings Case No. 92-DOF-007

In the Matter of Boise Cascade's Walker CreekTimber Harvest OperationPlan

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FINAL ORDER

Statement of the Case: On February 4, 1992, Boise Cascade Corporation, referred to as "Boise Cascade" hereinafter, submitted a written plan concerning a proposed harvesting operation in the Walker Creek area of Clatsop County. The plan was denied. On May 5, 1992, Boise Cascade submitted an amended written plan. The amended written plan was denied on May 15, 1992. Boise Cascade requested a hearing on June 12, 1992. A hearing was held in Salem, Oregon on October 20, 1992. Melinda L. Bruce and Jerome S. Lidz, Assistant Attorneys General, represented the Department of Forestry ("ODF"). Attorney Phillip D. Chadsey of Stoel Rives Boley Jones & Grey represented Boise Cascade. Charles Stone, Richard Skipper, Clint Smith and William A. Dryden appeared as witnesses. The Department of Forestry filed a post-hearing memorandum on November 4, 1992. Boise Cascade filed a reply memorandum on November 13, 1992.

A Proposed Order was served on the parties on December 17, 1992. Attorney Chadsey filed ex-

ceptions on behalf of Boise Cascade. The Oregon State Board of Forestry met in regular session on January 6, 1993, at the State Forester's Headquarters in Salem, Oregon. Melinda Bruce and Phillip Chadsey presented argument to the Board. After considering the record, the Board did approve and adopt the Hearing Officer's Proposed Order.

Legal Issue: Should the amended written plan for the proposed Walker Creek timer harvest operation be approved under the Forest Practices Act and OAR 629-24-809?

Hearing Officer's Findings of Fact: (1) Boise Cascade is a publicly held forest products company which owns and operates sawmills, plywood plants, and pulp and paper mills in Oregon. It also owns and manages commercial timberlands for the purpose of supplying wood to those facilities. (2) In October 1988, in a trade of commercial timberlands with Longview Fiber Corporation, Boise Cascade acquired some commercial timberlands in Clatsop County. (3) Boise Cascade subsequently harvested some timber from the lands and in October 1991 arranged a sale of all its Clatsop County lands to another company, Hampton. (4) A 64 acre parcel located in the SW 1/4, Section 6, Township 6 N., Range 6 N., was excluded from the sale. That parcel is referred to as the Walker Creek Unit hereinafter. (5) That property is presently and at all pertinent times has been zoned as commercial timberlands. (6) In 1988 the Oregon Department of Fish and Wildlife ("ODFW") declared the spotted owl to be a threatened species, although no protective measures were adopted at that time. (6A) As early as 1986, a male spotted owl had been observed on the Walker Creek Unit. In 1990, a pair of spotted owls nested and successfully

hatched two young owls on the property. (7) In 1991, a Boise Cascade survey identified a singe female in the area. No nesting activity was observed.

(8) On January 7, 1992, Boise Cascade filed Notification Number 92-521-11022 giving notice to the State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. (8) Because of the location of protected waters on or near the unit and the unit's identification as spotted owl habitat, a written plan was required. (9) Boise Cascade filed the written plan on February 4, 1992. (10) The plan provided that, if a pair of owls nested in the operations area, no operations would be conducted during the critical period of use, March 1 to September 30, or until the young owls fledged. (11) The written plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70 acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

(12) On May 5, 1992, Boise Cascade submitted an amended written plan. (13) The plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was different from the nest site observed in 1990. (14) The plan provided that Boise Cascade would not conduct operations in the area while the owls were present. (15) With respect to habitat, the plan stated that there were more than 70 acres of commercial timberland immediately adjacent to Boise Cascade's property and owned by the State of Oregon which could provide habitat for the owls after the Boise Cascade property had been logged. None of these properties encompassed the nest site. (16) On May 15, 1992, approval of the amended written plan was denied on

the stated ground that the plan filed to identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. (17) Forest Practices Forrester ("FPF") Richard E. Skipper's letter of denial made reference to a recent field inspection conducted by himself, Clint Smith, a wildlife and fisheries specialist with ODF, and Bosie Cascade's agent, during which 70 acres of suitable habitat was identified and which included 47 acres of Boise Cascade's Walker Creek Unit and 23 nearby acres on lands owned by a private owner and by the state. (18) The letter advised Boise Cascade that there were eight acres in the unit outside the designated suitable habitat that could be harvested or that the entire unit could be harvested if an incidental take permit was approved by the United States Fish and Wildlife Service ("USFWS").

(19) In August 1990, the Oregon State Forester adopted an interim administrative policy precluding timber harvest within a 70-acre core area of the best available spotted owl habitat around known nest sites or activity centers. (20) The 70-acre core area requirement was based on a similar requirement in the USFWS guidelines adopted after that agency on June 23, 1990 declared the spotted owl a "threatened species" under the federal Endangered Species Act. (21) The Oregon State Board of Forestry subsequently adopted OAR 629-24-809, which requires protection of a 70-acre core area of suitable habitat encompassing the nest site.

(22) Following a public hearing on February 28, 1991, on March 29, 1991, a hearing officer filed with the State Forester a document entitled "Report of Hearing Officer, Summary of Testimony, Findings and Conclusions," which wa concerned with the Board

of Forestry's proposed Forest Practice Rule for protection of Northern Spotted Owl nest sites when conducting forest operations on state and private lands. (23) In October 1991, the USFWS rescinded its guidelines pertaining to spotted owls on privately owned lands. (24) On January 6, 1992, Melinda L. Bruce, Assistant Attorney General of the Natural Resources Section, sent a letter to Ted Lorensen, Unit Manager for Technical Support (Monitoring and Policy) for the ODF, advising him that the recision of the federal guidelines concerning the northern spotted owl had no effect on the validity of OAR 629-24-809.

(25) On June 3, 1992, Boise Cascade's representative, Bill Dryden, sent FPF Skipper a letter. (26) On June 16, 1992, Jerome Lidz, Assistant Attorney General, sent a letter to Dale Hall of USFWS, in which he stated that ODF did not purport to be acting under the authority of the federal Endangered Species Act in enforcing its Forest Practices rules. The letter further stated that a decision by the USFWS that no incidental take permit was required under federal law would not satisfy the Oregon administrative rule which allowed the issuance of such a permit by the USFWS as an alternative means of complying with state law. (27) On July 29, 1992, Assistant Attorney General Lidz sent a letter to Phillip Chadsey, counsel for Boise Cascade. (28) Subsequent to denying Boise Cascade's plan to log the Walker Creek Unit, the State of Oregon has advertised for sale commercial timber on land that it owns in Clatsop County approximately one and a half miles from the Walker Creek Unit. The timber, which is to be clear cut, consists mostly of hardwoods that are not suitable owl habitat. (29) Adult spotted owls may live in a habitat that encompasses an area that has a radius of more than one and a half miles.

Conclusion and Reasons: The written plan was properly denied under the Forest Practices Rules. The plan fails to comply with the requirements of OAR 629-24-809.

OAR 629-24-809 provides as follows:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl . . . , the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> > (a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
> >
> > (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.
>
> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3) (a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80 percent); multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) in this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection (1) of this rule is not in lieu of any federal requirements related to the federal Endangered Species Act.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

OAR 629-24-695 states that the goal of resource site protection is "to ensure that forest practices do not lead to resource site destruction, abandonment or reduced productivity." For spotted owls, the resource site is the nesting site. (OAR 629-24-800).

Boise Cascade's written plan was rejected because it did not identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. The plan did not specifically identify any suitable spotted owl habitat, as defined in OAR 629-24-809(3); it simply stated that there was more than 70 acres of state-owned "commercial timberland immediately adjacent to the harvest area" which could provide habitat for the spotted owls after the Boise Cascade land had been logged. The nest site located on Boise Cascade's land was necessarily excluded from that habitat. At hearing Boise Cascade did not attempt to present evidence that it intended in the written plan to protect the nest site; in fact it acknowledged its intention in the planned operation to destroy the nest tree after the critical nesting period. Under the rule, the written plan could not be approved as submitted.

The Board of Forestry did not exceed its authority in adopting OAR 629-24-809.

In ORS 527.630 the legislature stated the policy of the Forest Practices Act as follows:

> (1) Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and acquatic life. Therefore, it is declared to be the public policy of the State of Oregon to encourage economically effi-

cient forest practices that assure the continuous growing and harvest of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish and wildlife resources and scenic resources within visually sensitive corridors as provided in ORS 527.755 that assures the continuous benefits of those resources for future generations of Oregonians.

In ORS 527.710 the legislature mandated that the Board of Forestry adopt administrative rules to carry out the purposes of the Forest Practices Act, to assure the continuous growing and harvesting of forest tree species and, consistent with ORS 527.630, to provide for the overall maintenance of air quality, water resources, soil productivity and fish and wildlife.

In addition to those specified rulemaking duties, the statute required the Board to collect and analyze the best available information and establish inventories of resource sites needing protection, including threatened and endangered species identified on lists that are adopted, by rule, by the State Fish and Wildlife Commission or are federally listed under the federal Endangered Species Act. Recognizing the potential conflicts between forest practices and resource sites, the Board was required to analyze such conflicts and adopt rules appropriate to protect such resource sites. The statute further required the Board to consult with other state agencies having functions with respect to the purposes specified in ORS 527.630 and to accommodate their rules and programs to the extent deemed by the Board to be appropriate and consistent with the purposes of ORS 527.630.

The Board's authority to enact OAR 629-24-809 is clear under the above statutes. Boise Cascade's argu-

ment that rules enacted under these statutes are invalid if they prevent or impede the growing or harvesting of any trees at any time on private lands is simply not rational. The statute explicitly recognizes inevitable conflict between forest practices, which include by statutory definition the harvesting of forest tree species, and resource site protection. The Board was required to adopt rules for resource site protection.

Neither does the rule exceed in scope the authority delegated to the Board of Forestry. The identified resource sites would not be protected from destruction, abandonment or reduced productivity if the site were maintained only during the period of critical use. The site is protected so that it might shelter and promote the continued existence of the threatened species; it is not, as Boise Cascade would have it, that a particular specimen of a threatened species is protected so that it can create a new resource site. The ODF's interpretation of its statutory mandate is consistent with the plain language of that mandate. The interpretation proposed by Boise Cascade is contrary to that plain language.

The evidence also establishes that in adopting OAR 629-24-809 the Board used what it believed to be the best scientific evidence available. Nothing in the statutory mandate excluded from consideration information gathered for purposes of enforcing the federal Endangered Species Act.

Finally, there is nothing substantial in the record to support Boise Cascade's arguments that the Board of Forestry improperly delegated authority to the USFWS; that the Board shifted enforcement of the state's endangered species protection laws to the federal government; or that the Board shifted the bur-

den of northern spotted owl protection from state lands to private lands.

OAR 629-24-809 is not invalid under the Oregon and United States constitutions. Both Article I, Section 18, of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the state from taking private land for a public use without just compensation to the landowner. Boise Cascade argues that the referenced rule is invalid under those constitutional provisions and cites as authority the recent U.S. Supreme Court decision, *Lucas v. South Carolina Coastal Commission*, 505 US ___,112 S Ct 2886, 120 L Ed 2d 798 (1992).

Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts in its Reply Memorandum that such an argument is not premature, it did not at hearing attempt to present evidence that any "taking" had in fact occurred. It was established that spotted owls had been observed on the property prior, to its purchase by Boise Cascade and that the ODFW had declared the spotted owl to be a threatened species in the year of purchase. There was also evidence that the 64 subject acres were part of a much larger tract of forestland, some of it contiguous to the Walker Creek Unit, and that Boise Cascade harvested timber from some of that acreage before late 1991 , when it sold off all its Clatsop County lands except the subject unit. The value of the harvested timber and the consideration received in the sale of adjoining acreage to Hampton were not established and Boise Cascade objected to any questions directed to establishing such facts. Boise Cascade's reasonable commercial expectations might well have been realized or

surpassed. Certainly there is an inadequate factual basis upon which to advance any claim of a constitutional taking.

FINAL ORDER

Approval of the amended written plan submitted by Boise Cascade for its proposed Walker Creek Unit timber harvest operation, Notification Number 92-521-11022, was properly denied under the Oregon Forest Practices Act and OAR 629-24-101 et seq.

/s/ James E. Brown

JAMES E . BROWN
STATE FORESTER and
SECRETARY to the BOARD
OF FORESTRY

Dated this 15th day of January, 1993.

You are entitled to judicial review of the Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the Provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of State Court Administrator, Supreme Court Building, Salem, Oregon, 97310, within 60 days from a service of the Final Order.

APPENDIX W

Oregon
DEPARTMENT OF
FORESTRY

STATE FORESTER'S
OFFICE

"STEWARDSHIP IN
FORESTRY"

October 15, 1997

Mike Hicks
Boise Cascade Corporation
450 Pacific Avenue
Monmouth, Oregon 97361

Dear Mike:

Through routine surveying and tracking of northern spotted owls conducted by the Department of Forestry's Lands Management Program, it has recently been determined that the parcel of forestland retained by Boise Cascade Corp. (when it sold off other holdings to Agency Creek in 1991)on Walker Creek, located at SW 1/4 Section 6, T6N, R6W, in Clatsop County, no longer fits the criteria for being designated as a northern spotted owl nesting site as used in OAR 629-665-210 (formerly OAR 629-24-809).

For the purposes of this rule, nesting site means the tree, when known, that contains the nest, or when not known, the activity center, of a pair of adult spotted owls. Of the pair that previously occupied the Walker Creek site, the female was found dead

last winter, and the male was recently observed at the Buster Quarry site more than eight miles away. No responses to surveying were registered this past season at the Walker Creek site.

In 1992, Boise Cascade filed notifications and written plans with the department for harvesting at this site. The written plan for a portion of the tract was denied because it did not adequately address the protection of a 70 acre area of suitable habitat around the nesting site. With the information that we have now regarding the site, if a notification were filed for harvest on this area, there would be no requirement for a written plan under the Forest Practices Act based on the existence of a northern spotted owl nesting site. Of course, any other requirements for written plans, such as operating within 100 feet of a fish-bearing stream, would still apply.

Although this parcel no longer qualifies as a northern spotted owl nesting site under the Oregon Forest Practices Act, I do not know how it will be regarded by the U.S. Fish and Wildlife Service under the Endangered Species Act. Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location. The Department of Forestry will be informing the U.S. Fish and Wildlife Service of our determination by copy of this letter.

Sincerely,

/s/ Charlie Stone
Charlie Stone
Forest Practices Director

CHS:na
cc: Members of the Oregon Board of Forestry
James E. Brown, State Forester
Russell Peterson, Regional Director, USFWS
Paula Burgess, Governor's National Resources Assistant
William Cloran, Asst. Attorney General
Phillip D. Chadsey, Stoel Rives, LLP

APPENDIX X

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

[Filed DEC. 24, 1997]

No. 93-2018

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

MONEY JUDGMENT

The claims presented in this case have been fully and finally adjudicated as follows:

Plaintiff's First Claim for Relief for Inverse Condemnation under the Oregon Constitution was voluntarily dismissed on plaintiff's own motion.

On Plaintiff's Second Claim for Relief—Count Two (Lucas Per Se Claim—U.S. Constitution), the court ordered that summary judgment be entered in favor of plaintiff.

On Defendant's Alternative Counterclaim (Declaratory Judgment) the court declares that the taking was temporary and defendant did not acquire a fee interest in plaintiff's property.

Finally, Plaintiff's Second Claim for Relief—Count One (Loretto Per Se Claim—U.S. Constitution) was

submitted to the jury which found in favor of plaintiff and against defendant.

Based on the jury's special interrogatory verdict in this action, dated November 21, 1997, plaintiff's damages in this action are as follows:

1.	January 15, 1993 Fair Market Value	$2,279,233
2.	Interest at the statutory legal rate of 9 percent per annum from the date of the taking, January 15, 1993, to the date the taking was lifted, October 17, 1997 (as determined by the court)	$1,156,251
3.	Sum of 1 and 2	$3,435,484
4.	October 17, 1997 Fair Market Value	$1,615,425
5.	Just Compensation for Temporary Taking of Plaintiff's Timber for period from January 15, 1993 to October 17, 1997 (3 minus 4)	$1,820,059

THEREFORE, IT IS ORDERED AND ADJUDGED that plaintiff shall have judgment against defendant as stated below.

MONEY JUDGMENT

A.	Judgment Creditor:	Boise Cascade Corporation
B.	Judgment Creditor's Attorney:	Philip D. Chadsey, OSB No. 66028
C.	Judgment Debtor:	State of Oregon
D.	The amount of the judgment:	$1,820,059.00
E.	Pre-judgment Interest:	None
F.	The judgment creditor is owed interest on $1,820,059.00 at the rate of 9 percent per annum from October 17, 1997.	
G.	Costs	Costs shall be determined following entry of judgment pursuant to ORCP 68 C.

DATED this 24th day of December, 1997.

/s/ Paula Brownhill
Paula J. Brownhill
Circuit Court Judge

SUBMITTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

APPENDIX Y

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Clatsop County Circuit Court No. 93-2018
CA A115966

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,

v.

STATE OF OREGON, BY AND THROUGH
THE STATE BOARD OF FORESTRY,
Defendants-Respondents.

ORDER DENYING MOTION TO
RECONSIDER PRIOR OPINION

Appellant has moved for reconsideration of a portion of the court's decision disposing of a previous appeal in the same trial court case. The motion is denied on the ground that this court's prior decision is final and may not be altered by way of a motion filed in a subsequent appeal.

Respondents' brief is due July 1, 2002.

/s/ Mary J. Deits
Chief Judge

JUN 24 2002
Date

c: Charles F. Adams
David F. Coursen

APPENDIX Z

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Clatsop County Circuit Court No. 93-2018
CA A115966

BOISE CASCADE CORPORATION,
a Delaware corporation,
Plaintiff-Appellant,

v.

STATE OF OREGON, by and through
THE STATE BOARD OF FORESTRY,
Defendant-Respondent.

ORDER ON RECONSIDERATION

On June 11, 2002, the court granted an extension of time through July 1, 2002, for filing of the respondent's brief. Appellant has filed an objection.

Upon reconsideration, NO FURTHER extensions of time will be granted. The respondent's brief remains due July 1, 2002. Failure to file the respondent's brief by July 1, 2002, shall result in this case proceeding without benefit of a respondent's brief.

/s/ Mary J. Deits
MARY J. DEITS
Chief Judge

June 18, 2002
Date

c: Charles F. Adams
David F. Coursen